Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

JOHN DAVID RUELAS,

Petitioner,

v.

HUGH WOLFENBARGER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an involuntary guilty plea is subject to harmless-error review.

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INTRODUCTION

This Court's guidance is needed to resolve a conflict between the decision below and decisions of other courts of appeals on an issue of practical and constitutional importance: once a federal court concludes that a state prisoner's guilty plea was involuntary, is federal habeas relief required or does the federal court proceed to examine whether that involuntary guilty plea was "harmless"? Contrary to the decisions of the Second, Third, Tenth, and Eleventh Circuits, and in a stark departure from this Court's decisions, the Sixth Circuit has held that a state prisoner is not entitled to federal habeas relief for an involuntary guilty plea if the federal court determines that the involuntary guilty plea did not have a "substantial and injurious effect" on his conviction because the evidence of guilt was such that the outcome—the conviction—would have occurred regardless.

The Sixth Circuit's opinion will have profound effects, and it will make federal habeas relief for involuntary guilty pleas effectively unattainable. A guilty plea, by definition, short-circuits any need for development of a defense, so nearly every record a federal court will consider in conducting its harmless-error analysis will be stacked against the defendant. Moreover, the Sixth Circuit's focus on whether the conviction was inevitable has the illogical result of making it more difficult to obtain federal habeas relief for an involuntary guilty plea than for ineffective assistance of counsel in the decision to plead guilty, where the focus is on whether the defendant would still have chosen to

plead guilty absent his counsel's deficient performance.

This case presents an ideal vehicle for the Court to provide much-needed guidance on whether harmless-error review applies to an involuntary guilty plea. No threshold factual issues regarding the voluntariness of the plea are wrapped up with the Sixth Circuit's analysis; the Sixth Circuit's holding is based on the premise that the plea was involuntary. Under these circumstances, the important question in this case is cleanly presented, and the Court should take the opportunity to answer it.

OPINIONS BELOW

The Sixth Circuit's decision is reported at 580 F.3d 403 (6th Cir. 2009) and reprinted in the Appendix at 1a. The opinion and order of the United States District Court for the Eastern District of Michigan granting Mr. Ruelas's habeas petition is reprinted in the Appendix at 22a.

JURISDICTION

The court of appeals issued its decision on September 8, 2009. On November 17, 2009, Justice Stevens extended the time for filing this petition to and including January 21, 2010. This Court has jurisdiction under 28 U.S.C. § 1252(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution provides, in relevant part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

On January 23, 2002, Petitioner John David Ruelas ("Ruelas") struck his elderly mother Margaret Ruelas two or three times during a heated argument regarding his ex-wife. Ruelas's blows caused her to fall backward and strike her head. Ruelas, who lived with his mother, tried to care for her that night after her fall. But when he woke early on January 24, 2002 to give her an insulin shot, he found her

unresponsive and summoned help. She was later pronounced dead from complications arising from blunt force trauma.

A. State Court Proceedings

1. On July 17, 2002, Ruelas pleaded guilty to "open murder" in a Michigan state court. "Open murder" under Michigan law is a charge of criminal homicide that leaves the degree or level of offense (*e.g.*, first- or second-degree) undefined and requires the court to receive evidence to determine the degree. *See* Mich. Comp. Laws § 750.318.

Ruelas pleaded guilty to open murder based on assurance by the state court that it would consider manslaughter—the offense that Ruelas believed accurately reflected the accidental nature of his mother's death. The record of Ruelas's plea hearing is unequivocal that he was pleading guilty to open murder "with the understanding that there would be [a] degree hearing to establish whether this was first, second degree *or manslaughter*[—]one of those degrees." App. 46a. The state court confirmed this understanding by stating that it would consider manslaughter—along with first- and second-degree murder—at the later degree hearing. App. 48a.

In fact, the state court had misinformed Ruelas; actually, it could not consider manslaughter under then-governing Michigan law, which did not include manslaughter as a lesser-included offense of murder. *People v. Van Wyck*, 262 N.W.2d 638, 639-40 (Mich. 1978) (classifying manslaughter as a "cognate" offense of murder). Consideration of manslaughter was therefore barred because it was not charged in

the indictment. *People v. Cornell*, 646 N.W.2d 127, 138 (Mich. 2002) (barring consideration of cognate offenses not charged in the indictment). Michigan authorities have never disputed that Ruelas was given misinformation by a state court judge that then-governing Michigan law allowed the court to consider manslaughter in a plea to open murder.

The state court's findings at the degree hearing are consistent with it being barred by state law from considering manslaughter. App. 63a-64a. Although the court explicitly addressed first-degree and second-degree murder, the court never mentioned manslaughter, never explained why manslaughter was not the appropriate offense, and simply never indicated that manslaughter was considered at all. It made no specific findings about whether Ruelas acted in the heat of passion, as would be necessary if the court had considered manslaughter.

2. Ruelas later learned that he had been misinformed that manslaughter could be considered in a guilty plea to open murder. So, with the assistance of new counsel, he pursued motions to withdraw his plea, arguing that his plea was unknowing and involuntary because the court erroneously led him to believe, before he entered his plea, that the court could consider a manslaughter charge. App. 66a-68a.

At a hearing on Ruelas's motion, the state court acknowledged there was an error at his plea hearing, but nevertheless found that the error was harmless:

> Well, in terms of the degree hearing, I mean, I think it was error but it was, I

> mean, it was unpreserved. They actually sort of seemed like they were part and parcel with it in assisting the Judge in making the error. I think it was *harmless*, given the fact that they had a hearing and he was found guilty of second degree. So *I think that unpreserved error is harmless and I don't think it's a sufficient basis for setting aside the plea.*

App. 74a-75a (emphasis added). The court denied Ruelas's motion to withdraw his plea on January 5, 2005. App. 78a. His state appeals were later rejected. App. 79a; *People v. Ruelas*, 471 Mich. 927 (2004).

B. Federal Court Proceedings

1. On May 1, 2006, after exhausting his state post-conviction remedies, Ruelas filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan, raising a claim, among others, that his guilty plea was involuntary.

On March 31, 2008, the district court granted habeas relief on Ruelas's contention that his guilty plea was involuntary. The district court found that the state trial court had misinformed Ruelas that he could be found guilty of manslaughter under the open murder statute. App. 35a-36a ("Although a judge or jury may now consider the offense of manslaughter under Michigan's open murder statute, *People v. Mendoza*, 468 Mich. 527, 529 (2003), this was not the case at the time of [Ruelas's]

July 17, 2002 plea. *People v. Watkins*, 468 Mich. 233, 238 (2003).").

The district court held that the state trial court's error was not harmless because it "c[ould] not conclude that the outcome of [Ruelas's] case was unattributable to the trial court's error." App. 36a. The district court rejected the argument that the trial court's error would be "harmless" if "the evidence against [Ruelas] supported a finding of second degree murder." App. 37a. The district court found that the trial court's erroneous assurance that manslaughter was on the table was not harmless because Ruelas would not have pleaded guilty to open murder if he had known that a plea to open murder would have precluded consideration of manslaughter. Relying on this Court's statement in *Bousley v. United States*, 523 U.S. 614, 618-19 (1998), that a guilty plea is constitutionally invalid if neither the defendant, nor his counsel, nor the trial court understood the crime with which the defendant was charged, the district court granted Ruelas's § 2254 petition. The state appealed.[1]

2. The Sixth Circuit reversed the district court's grant of habeas relief. App. 1a. As the foundation for its analysis, the Sixth Circuit assumed Ruelas's plea was involuntary as a result of the trial court's

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[1] Before it appealed, the state filed a motion for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Because the state's Rule 60(b) motion was filed more than ten days after the district court's judgment, it did not affect the state's appeal. *See* Fed. R. App. P. 4(a)(4)(vi) (2008). In any event, the district court denied the state's Rule 60(b) motion before the Sixth Circuit issued its decision. App. 80a.

error. App. 13a ("[T]he simplest way to resolve this case is to assume that Michigan either could not or did not consider manslaughter, and to further assume such error rendered Ruelas's guilty plea involuntary. We thus assume a constitutional violation, so the question is whether that violation was harmless or not."). With this assumption in place, the court's discussion centered on whether this type of error is "structural," and therefore requires automatic reversal, or instead, whether it should be evaluated under harmless error review.

The court concluded that an involuntary plea is not a structural error because it does not "'defy' analysis by normal harmless error standards." App. 13a (citing *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)). Going further, the court rejected Ruelas's argument that an involuntary guilty plea is a structural error as "rel[ying] on the faulty premise . . . that the remedy for all involuntary guilty pleas is the right to go back, plead innocent, and have a trial. That is sometimes the remedy, but not always, and not here." App. 14a. Instead, the court reasoned that "guilty pleas are in the nature of contracts" and that a judge can evaluate whether a defendant is harmed by an involuntary guilty plea by considering whether the defendant received the benefit of his bargain. App. 14a.

Having rejected the application of structural error principles to Ruelas's involuntary guilty plea, the court proceeded to analyze whether Ruelas was harmed by the involuntary guilty plea by applying the "substantial and injurious effect" standard of *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

Under the *Brecht* standard, the court reasoned, Ruelas was not entitled to relief because the error—an involuntary plea—did not have a substantial injurious effect. In the court's view, the key "question is whether Ruelas was prejudiced such that he lost a legitimate chance to be sentenced to manslaughter rather than second-degree murder." App. 19a. The court held that "the failure to consider manslaughter did not have a substantial and injurious effect on Ruelas's chance of receiving a manslaughter charge, as the charge of second-degree murder was well supported and Ruelas offered little evidence of provocation." App. 21a. In arriving at its decision, the Sixth Circuit focused on determining whether Ruelas would have been convicted under the second-degree murder charge, notwithstanding the error. Unlike the district court—but without rejecting any of the district court's factual findings—the court of appeals did not consider whether Ruelas would have pleaded guilty in the first place had he known that a manslaughter conviction was not available.

REASONS FOR GRANTING THE WRIT

Without question, guilty pleas are indispensible to the functioning of the criminal justice system. Indeed, guilty pleas account for the vast majority of felony convictions. *See, e.g.*, U. S. Dep't of Justice, Bureau of Justice Statistics, Felony Sentences in State Court, 2006-Statistical Tables (Dec. 2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting that in 2006 over 94% of sentences in state court for felonies resulted from guilty pleas).

Nevertheless, the ramifications of a decision to plead guilty are profound. A guilty plea "is not simply a strategic decision." *Florida v. Nixon*, 543 U.S. 175, 187 (2004). Rather, "[a] guilty plea . . . is an event of signal significance in a criminal proceeding." *Id.* Being far "more than a confession" to a crime, a guilty plea "is itself a conviction" that aborts the criminal trial. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). "By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers." *Nixon*, 543 U.S. at 187; *see also Boykin*, 395 U.S. at 243.

Despite the prevalence of guilty pleas, their use must be scrutinized by the courts to avoid substituting the choices of counsel for the choices of the criminal defendant or otherwise vitiating the knowing and voluntary nature of such pleas. For this reason, in accord with the "signal significance" of the decision to plead guilty, defense counsel lack authority to consent to guilty pleas on behalf of their client, *see Brookhart v. Janis*, 384 U.S. 1, 6-7 (1966), and a defendant's tacit acquiescence in a decision to plead guilty is insufficient to render the plea valid, *see Boykin*, 395 U.S. at 242.

To ensure that those fundamental constitutional rights are waived only by a purposeful decision of the defendant, this Court has set out exacting requirements that must be fulfilled for a guilty plea to be valid, with the most fundamental requirement being that a "plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'"

Bousley v. United States, 523 U.S. 614, 618 (1998) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)); *see also Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976) ("[A] plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense."). And, as this Court has "long held," "a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley*, 523 U.S. at 618 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). A guilty plea "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748. A guilty plea is "constitutionally invalid" if "neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged." *Bousley*, 523 U.S. at 618-619.

The constitutional prerequisite to accepting Ruelas's guilty plea—a voluntary and intelligent waiver—was simply not satisfied in this case. Ruelas pleaded guilty counting on manslaughter being considered at the subsequent degree hearing for open murder. What Ruelas did not count on was that everyone—the court, prosecution, defense counsel, and, most importantly, Ruelas himself—would misunderstand the law governing open murder: manslaughter was not a degree of open murder and thus could not be considered at the degree hearing as Ruelas's actual offense. Ruelas had unwittingly pleaded guilty to one of two offenses (either first or second degree murder)—neither of

which he believed he committed. Under these circumstances, there can be little doubt that Ruelas's guilty plea did not meet the basic constitutional requirement that it be knowingly and intelligently made. *See id.* at 618. It was therefore flatly invalid.

I. The Sixth Circuit's Application of Harmless-Error Review to an Involuntary Guilty Plea Is Contrary to this Court's Precedent and Creates a Conflict Among the Circuits.

The Sixth Circuit's holding that it could apply harmless error standard to an involuntary guilty plea conflicts with the decisions of the Second, Third, Tenth, and Eleventh Circuits, which do not apply harmless-error review to involuntary guilty pleas. *See Hicks v. Franklin*, 546 F.3d 1279, 1287 (10th Cir. 2008) (granting habeas relief under 28 U.S.C. § 2254 for an involuntary guilty plea with no application of harmless-error review); *Jameson v. Klem*, 544 F.3d 266, 279 (3d Cir. 2008) (same); and *Hanson v. Phillips*, 442 F.3d 789, 802 (2d Cir. 2006) (same); and *Pardue v. Burton*, 26 F.3d 1093, 1097 (11th Cir. 1994) (rejecting a state's argument that an involuntary guilty plea could be harmless error). As the Eleventh Circuit in *Pardue* explained, "[a] claim that a plea was not knowing and voluntary because a defendant did not know of his full pleading alternatives may not be subject to harmless error analysis," and it is "irrelevant" whether the outcome would be the same. *Pardue*, 26 F.3d at 1097 n.6; *see also United States v. Amaya*, 111 F.3d 386, 389 (5th Cir. 1997) ("reject[ing] . . . as irrelevant" and contrary to *Henderson* the government's argument

that there was no harm because the evidence of guilt was so overwhelming that the defendant would have pleaded guilty regardless of the misinformation); *United States v. Hernandez*, 203 F.3d 614, 627 (9th Cir. 2000) (concluding in a direct appeal of a criminal conviction that the plea was involuntary and vacating the conviction without requiring any additional showing of prejudice).

The approach of these circuits—in contradistinction with the Sixth Circuit's approach—is in accordance with this Court's recognition that some constitutional errors so fundamentally infect the process of adjudicating guilt or innocence that a new trial must be provided. *See Gomez v. United States*, 490 U.S. 858, 876 (1989) (critical stage of criminal proceeding conducted by person without jurisdiction to preside); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (trial by judge lacking impartiality). Even as this Court adopted the general rule that most constitutional errors occurring during a trial could be analyzed under harmless-error review, it nonetheless recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967).

No constitutional right is more basic to a fair trial than the constitutional right to the trial itself. Quite simply, an involuntary guilty plea, which deprives a defendant of that basic right, is not subject to harmless-error analysis because harmless-error analysis applies only to errors occurring at trial. "Harmless-error analysis . . . presupposes a trial, at which the defendant, represented by counsel,

may present evidence and argument before an impartial judge and jury." *Rose v. Clark*, 478 U.S. 570, 578 (1986). An involuntary guilty plea is *pre*-harmless error. Harmless-error analysis is therefore inapplicable.

If an involuntary guilty plea falls under any error standard, it must fall under the "structural error" standard that applies to constitutional violations that are not capable of being analyzed for harmless error because they "are structural defects in the constitution of the trial mechanisms." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). These errors "defy analysis by 'harmless-error' standards" because "[t]he entire conduct of the trial from beginning to end" is affected. *Id.* at 309-310. These violations are "structural defect[s]" that "affect[] the framework within which the trial proceeds," rather than simply being "an error in the trial process itself." *Id.*; *accord United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 & n.4 (2006).

A conviction resulting from a trial infected by a structural error requires reversal, regardless of whether the outcome of the trial would have been the same in its absence. *See Tumey*, 273 U.S. at 535 ("No matter what the evidence was against [the defendant], he had the right to have an impartial judge."); *see also Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J. dissenting) ("The very premise of structural-error review is that even convictions reflecting the "right" result are reversed for the sake of protecting a basic right.").

This Court has identified structural errors as including a trial by a judge who was not impartial,

see Tumey, 273 U.S. at 535; the denial of counsel, *see Gideon v. Wainwright*, 372 U.S. 335 (1963); the denial of the right of self-representation, *see McKaskle v. Wiggins*, 465 U.S. 168, 177-178 (1984); the denial of the right to public trial, *see Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984); the unlawful exclusion of the members of a defendant's race from a grand jury, *see Vasquez v. Hillery*, 474 U.S. 254 (1986); the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, *see Sullivan v. Louisiana*, 508 U.S. 275 (1993); and the denial of the right to counsel of choice, *see Gonzalez-Lopez*, 548 U.S. at 152 (2006). Structural errors are "categorical." *See Neder*, 527 U.S. at 14.

Like these structural errors, an involuntary guilty plea undeniably "affect[s] . . . the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 309. Although this Court has not yet formally categorized an involuntary plea as a structural error, it has consistently treated it as such. Involuntary guilty pleas are "constitutionally invalid." *See Bousley*, 523 U.S. at 618-19; *see also Smith*, 312 U.S. at 334. And because involuntary guilty pleas are invalid, they cannot support a conviction. *See Henderson*, 426 U.S. at 644-45; *Smith*, 312 U.S. at 334 (holding a conviction based on an involuntary plea "cannot stand"). The constitutional defect arising from an involuntary guilty plea can never be harmless. The Court's decision in *Henderson v. Morgan* crystallizes this point. In *Henderson*, the defendant's guilty plea was unknowing and therefore involuntary because he was not informed of a key element of the offense. 426 U.S. at 647. Even though the Court "assume[d] .

. . that the prosecutor had overwhelming evidence of guilt available," that defense counsel gave competent advice to plead guilty, and "that [the defendant] probably would have pleaded guilty anyway," the Court held that the guilty plea "c[ould] not support a judgment of guilty" unless it was voluntary. *Id.* at 644-45 & n.12.

In fact, an involuntary guilty plea, more so than any other error that has been categorized as structural, "affects the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 109, by wrongfully aborting the trial process as the mechanism for adjudication of guilt. *See Rose v. Clark*, 478 U.S. 570, 578 n.6 (1986) ("[E]ach of the examples *Chapman* cited of errors that could never be harmless either aborted the basic trial process . . . or denied it altogether.").

Where, like here, a plea is involuntary as the result of a defendant being misinformed about the nature of the offense, the involuntary plea, like all structural errors, has "consequences that are necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282. A defendant's understanding of the charged offense will inform his choice among a myriad of possible strategies, including how to plead. *Cf. Gonzalez-Lopez*, 548 U.S. at 150 (noting the various choices that could have been affected if a defendant had not been deprived of his counsel of choice). In light of Ruelas's multiple statements on the record regarding the accidental nature of his offense, he would not have pleaded guilty to open murder had he known that manslaughter was not capable of being considered

under that charge. The consequences of a misinformed decision to forego trial and thus to relieve the prosecution of its burden of proof are necessarily unquantifiable and indeterminate.

Yet, despite this Court's consistent authority treating an involuntary plea like a structural error not subject to harmless-error analysis, the Sixth Circuit held that an involuntary guilty plea is "not [a] 'structural'" error and did not "'def[y]' harmless error standards." App. 13a-14a. Accordingly, the Sixth Circuit purported to examine whether Ruelas was prejudiced by the involuntary plea by applying the "substantial and injurious effect" harmless-error standard set forth in *Brecht v. Abrahamson*, 507 U.S. at 631, that applies to claims brought under § 2254. *See Fry v. Pliler*, 551 U.S. 112, 121 (2007).[2] The court of appeals then purported to examine whether the involuntary plea had a "'substantial and injurious effect or influence' on the determination that [Ruelas] was guilty of second-degree murder." App. 19a. The Sixth Circuit concluded that Ruelas's involuntary plea did not have a "substantial and

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[2] The Sixth Circuit candidly acknowledged that its approach to harmless-error review in § 2254 habeas cases created a conflict with the Seventh Circuit. App. 17a-18a. The Sixth Circuit interpreted this Court's decision in *Fry* to mean that a federal habeas court conducting harmless-error review goes straight to the *Brecht* harmless-error standard without considering first, per *Mitchell v. Esparza*, 540 U.S. 12 (2003), whether the state court unreasonably applied the *Chapman* harmless-error standard. The Seventh Circuit mandates a much different approach, where, if a state court has conducted a harmless-error analysis, the federal habeas court must determine first if the state court's analysis was an unreasonable application of the *Chapman* standard before applying the *Brecht* standard. *See Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009).

injurious effect" on his conviction because "he would have still been found guilty of second-degree murder" even if the trial court could consider manslaughter. App. 20a. In other words, in the view of the court of appeals, there was no harm by Ruelas's plea being unknowing and involuntary because his conviction of second-degree murder was inevitable.

But the proper inquiry for the Sixth Circuit was not whether Ruelas would still have been found guilty of second-degree murder regardless of how he pleaded. That approach fails to account for the myriad of choices Ruelas may have made if properly informed about the offenses that could be considered if he pleaded guilty to the open murder charge. He could still have made the voluntary choice to plead guilty and have his fate determined by a state judge acting from the bench. He could have sought a more favorable plea agreement that limited his sentencing exposure for a second-degree murder conviction to be more inline with manslaughter. Or he could have chosen to exercise his fundamental right to have his guilt adjudicated by a jury.

The Sixth Circuit reached its remarkable conclusion that an involuntary guilty plea could be harmless through the following flawed syllogism: First, the Sixth Circuit lumped together the constitutional violations of an involuntary guilty plea and a breach of a plea agreement as being one and the same. *See* App. 14a ("[B]ecause guilty pleas are in the nature of contracts, *Puckett* [*v. United States*], 129 S. Ct. [1423,] 1430 [(2009)], the remedy for Ruelas is specific performance of what he bargained for: a degree hearing where first-degree murder,

second-degree murder, and manslaughter could all be considered."). Next, having reduced an involuntary guilty plea to the status of a mere breached contract, the Sixth Circuit proceeded with a harmless-error analysis of the involuntary plea by purportedly assessing the likelihood that Ruelas would have been convicted of manslaughter, had the state court considered such a charge. App. 19a-20a.

The Sixth Circuit's first premise that an involuntary guilty plea is one and the same with a breached plea agreement is contrary to this Court's recent decision in *Puckett v. United States*, 129 S. Ct. at 1423, on which the Sixth Circuit purportedly relied. In *Puckett*, which addressed whether plain error review applied to a breached plea agreement, the defendant argued that plain error review should not apply because a breached plea agreement retroactively causes the plea that the agreement induced to have been unknowing and involuntary. *Id.* at 1429-30. This Court rejected that argument as contrary to basic contract law principles, where a failure of one party to fulfill its promises under the contract (*i.e.*, the plea agreement) does not make the contract itself void—just breached. *Id.* at 1430. This case does not involve a situation where a defendant is attempting to project involuntariness back in time based on post-formation events or breaches. Rather, this case concededly involves a plea that was involuntary from its very inception.

As *Puckett* explained: "[I]t is entirely clear that a breach [of a plea agreement] does not cause the guilty plea, when entered, to have been unknowing or involuntary." *Id.* To the contrary, "[i]t is precisely

because the guilty plea was knowing and voluntary (and hence valid) that the Government is obligated to uphold its side of the bargain." *Id.* (emphasis original). This case, however, does not concern a breached plea agreement. Here, the guilty plea itself is invalid because, unbeknownst at the time to everyone involved, it was premised on something that could not be fulfilled. *Cf. United States v. Watley*, 987 F.2d 841, 848 (D.C. Cir. 1993) (Ginsburg, R.B., J.) (holding that (i) when a defendant pleads guilty premised on a "basic assumption" that the judge possessed discretion to adjust a sentence, "'fair and just reason' demanded that [the defendant] be given a chance to reconsider his plea" when that assumption was wrong and (ii) the defendant "should not have been held to a bargain struck between prosecutor and defense counsel that relied in significant measure on sentencing discretion that the district judge did not have").

The court of appeals thus erred in equating an involuntary guilty plea with a breached plea agreement. The two are fundamentally different, as *Puckett* makes explicitly clear. In fact, the flaw in the Sixth Circuit's logic is readily apparent by considering that, had the court viewed the evidence as supporting manslaughter, it could not have ordered specific performance of the "deal" to consider manslaughter because such an action would have been *ultra vires*. Instead, Michigan law by its terms would have limited any order of specific performance to a choice between first- and second-degree murder—manslaughter was not an option.

The Sixth Circuit's second premise—that harmless-error analysis here could be based on hypothetically determining whether Ruelas stood any chance of being convicted of manslaughter—ignores this Court's precedents for evaluating constitutional errors and extends harmless-error review far beyond what law and logic allow. "Harmless-error analysis in such a context [is] a speculative inquiry into what might have occurred in an alternative universe." *Gonzalez-Lopez*, 548 U.S. at 150.

This Court has presumed that "harmless-error analysis . . . would not apply if a court directed a verdict for the prosecution in a criminal trial" because "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *Rose*, 478 U.S. at 578 (internal quotation marks omitted). Yet, the Sixth Circuit has essentially done exactly what a trial court could not do: It directed a verdict for the prosecution by concluding that "had the judge considered manslaughter at Ruelas's degree hearing, he would have still been found guilty of second-degree murder." App. 20a.

Under a proper application of harmless-error review, a court does not focus on whether it believes the conviction was inevitable. "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."

Sullivan, 508 U.S. at 279 (emphasis in original). This was not the Sixth Circuit's inquiry. The Sixth Circuit did not consider the inescapable fact that Ruelas's guilty verdict was attributable to his involuntary plea of guilty. Instead, the Sixth Circuit speculated that, had Ruelas's plea not been involuntary, he would still have been convicted of second-degree murder. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Id.* at 280.

Finally, the Sixth Circuit's approach is irreconcilable with *Henderson*. *Compare* App. 21a (holding that the involuntary plea "did not have a substantial or injurious effect on Ruelas's chance of receiving a manslaughter charge, as the charge of second-degree murder was well supported and Ruelas offered little evidence of provocation") with *Henderson*, 426 U.S. at 644-45 (affirming habeas relief even assuming that there was "overwhelming evidence of guilt").

The Sixth Circuit's erroneous application of harmless-error review to an involuntary guilty plea does not stand alone. At least two state courts of last resort have agreed with the same erroneous view of the law. The Indiana Supreme Court held that the failure to inform a defendant of the true nature of the charge, as required by *Henderson*, "will constitute harmless error, *i.e.*, be harmless beyond a reasonable doubt, where during the course of the guilty plea or sentencing proceedings, the defendant unambiguously admits to, or there is other evidence

of, facts that demonstrate specific intent beyond a reasonable doubt." *Patton v. State*, 810 N.E.2d 690, 696-97 (Ind. 2004). Worse, in a less fact-dependent ruling, the Texas Court of Criminal Appeals held that an error relating to the voluntariness of a plea is not a structural error and therefore "is [not] categorically immune to a harmless error analysis." *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). Review by this Court is necessary to clarify whether an involuntary guilty plea can ever be harmless.

II. Even If an Involuntary Guilty Plea Could Be Evaluated Under Harmless-Error Standards, the Sixth Circuit Erroneously Focused on Whether Ruelas Would Have Been Convicted If the Plea Had Been Voluntary, Rather Than on Whether He Would Still Have Pleaded Guilty.

As an alternative matter, the Sixth Circuit's approach fails to square with harmless-error doctrine. Even if an involuntary guilty plea were capable of being evaluated under harmless-error principles (which it is not), the "harm" or prejudice to be considered should be whether the involuntary plea deprived the defendant of a trial that he would have taken. This was the district court's approach to harmless error. App. 36a-37a. The burden of proving harm from an involuntary guilty plea can be no greater than the burden of proving harm from professionally unreasonable advice of counsel to plead guilty or from a court's failure to comply with procedural rules governing the acceptance of guilty pleas.

When a defendant alleges that his guilty plea is involuntary because he pleaded guilty based on constitutionally deficient advice of counsel, the prejudice inquiry is whether, but for the counsel's deficient advice, the defendant would not have pleaded guilty. *See Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985). Likewise, when a court accepts a guilty plea without providing all the warnings required by Rule 11 of the Federal Rules of Criminal Procedure, the prejudice inquiry is whether the defendant would not have pleaded guilty if he had been properly warned. *See United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004). The point of *Hill* and *Dominguez Benitez* is that a defendant is prejudiced when the underlying error (i.e., ineffective assistance of counsel or failure to comply with procedural rules) deprives the defendant of a trial that he would have taken. *Cf. Roe v. Flores-Ortega*, 528 U.S. 470, 485-486 (2000) (holding that the focus of the prejudice inquiry for a petitioner claiming ineffective assistance of counsel deprived him of an appeal is whether, but for his counsel's deficient performance, he would have appealed).

Yet, the Sixth Circuit has invented in the habeas context a new standard for an involuntary plea that, rather than asking whether the defendant would nonetheless have pleaded guilty, requires a defendant to show that he would not have been convicted. Such a prejudice standard defies practical application and is inconsistent with the Constitution. A valid guilty plea requires either admission by the defendant to the elements of the offense or a proffer by the prosecution of facts necessary to establish guilt. *See North Carolina v. Alford*, 400 U.S. 25, 37

(1970). But by pleading guilty, a defendant gives up his right to challenge the prosecution's case against him, and thus rarely develops evidence to show innocence or the factual context of his crime. A defendant who turns out to have pleaded guilty unknowingly would therefore rarely, if ever, be able to show that he would not have been convicted.

The upshot of the Sixth Circuit's new standard is that it would be more difficult to obtain *direct* relief for an involuntary guilty plea than raising an *indirect* challenge to a guilty plea based on ineffective assistance of counsel. If any prejudice inquiry is required before a state prisoner is entitled to habeas relief for an involuntary guilty plea, the inquiry must be no more demanding than showing that, if given a new opportunity, the petitioner would not have pleaded guilty. Even if an involuntary guilty plea could be evaluated under harmless-error standards, review by this Court is necessary to clarify what "harm" is to be considered.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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January 21, 2010

APPENDIX

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JOHN DAVID RUELAS,
Petitioner-Appellee,

v.

HUGH WOLFENBARGER,
Respondent-Appellant.

No. 08-1571.

United States Court of Appeals, Sixth Circuit.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 06-11994—Denise Page Hood, District Judge.

Argued: June 11, 2009

Decided and Filed: September 8, 2009

Before: MARTIN and KETHLEDGE, Circuit Judges; WATSON, District Judge.*

COUNSEL

ARGUED: Jerrold E. Schrotenboer, JACKSON COUNTY PROSECUTOR'S OFFICE, Jackson,

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* The Honorable Michael H. Watson, United States District Judge for the Southern District of Ohio, sitting by designation.

Michigan, for Appellant. Nathan S. Mammen, KIRKLAND & ELLIS LLP, Washington, D.C., for Appellee. **ON BRIEF:** Jerrold E. Schrotenboer, JACKSON COUNTY PROSECUTOR'S OFFICE, Jackson, Michigan, for Appellant. Nathan S. Mammen, Charles A. Fernandez, KIRKLAND & ELLIS LLP, Washington, D.C., for Appellee.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge.

John David Ruelas pleaded guilty to "open murder" for causing his mother's death. At his "degree hearing," where a judge was to find the proper level of criminal homicide for Ruelas based on his plea, he was found guilty of second-degree murder. Ruelas has now filed a petition for a writ of federal habeas corpus, contending that his plea was not made knowingly or voluntarily and was thus unconstitutional. The district court agreed, and granted him a conditional writ of habeas corpus. Because we believe that even if his plea was involuntary any constitutional error was harmless, we REVERSE.

I.

In 2002, Ruelas, then thirty-eight years old, moved back into his mother's house after he and his wife divorced. Ruelas and his mother frequently argued, and in January of that year, he referred to his ex-wife as a "bitch." His mother scolded him, and he gave her "a couple of strikings." J.A. 217. As a result, his mother, seventy-six years old, died.

Ruelas was arrested and, in July 2002, pleaded guilty to "open murder" in exchange for the dismissal of a second felony offender charge. In Michigan, "open murder" pleas permit a judge to determine, based on the plea agreement, what level of criminal homicide is appropriate. The plea agreement between Ruelas and the prosecutor stated that the circuit court would consider first-degree murder, second-degree murder, and manslaughter. First-degree murder carried a possible sentence of up to life with no parole; second was life with the

opportunity for parole; manslaughter was capped at fifteen years in jail. The circuit court, after ruling out first-degree, found Ruelas guilty of second-degree murder. Ruelas was sentenced to 250 months to 40 years in prison with the possibility of parole.

Ruelas then began a series of challenges to his guilty plea and conviction. These culminated in an attempt to withdraw his plea. The trial court construed his motion to withdraw his plea as a motion for relief from judgment and denied it. Ruelas argued first that the circuit court never mentioned manslaughter when it found him guilty of second-degree murder, and, second, that at the time Ruelas pleaded to and was found guilty of second-degree murder, manslaughter could not have been considered during an "open murder" hearing under Michigan law. Ruelas argued that this rendered his plea involuntary because he thought he had a shot of being found guilty of merely manslaughter.

The state courts denied this claim, finding that his plea was not involuntary and, even if it was, any such error was "harmless." Ruelas then filed a petition for a writ of habeas corpus in federal court, alleging (among other things), that his plea was unknowing and involuntary and that his guilty plea must be vacated as a result. Ruelas does not argue that someone else killed his mother; he argues that the highest charge sustainable against him is manslaughter. Br. of Petitioner/Appellee at 12. The district court rejected most of Ruelas's arguments but agreed that his guilty plea was improper and further that this defect had a substantial and injurious effect on his conviction. The district court granted the writ because it concluded that Ruelas

was likely to have pleaded innocent if he had known he was ineligible for manslaughter, and therefore he was entitled to habeas relief. Michigan appeals.

II.

Two minor points must be cleared up before addressing the merits. First, Michigan argues that, though Ruelas otherwise exhausted his state remedies before filing his habeas petition, we should nevertheless dismiss his claim as unexhausted because there is a chance that, were he to file a new motion in state court, Michigan's courts might change the law and allow his petition to proceed. Specifically, Michigan argues that, were we to dismiss Ruelas's case, the Michigan courts might find the Supreme Court's decision in *Castro v. United States*, 540 U.S. 375 (2003) persuasive. In *Castro*, the Court held that if a court construes a *pro se* petitioner's motion to have been asserted under a ground different than the one stated, the re-styled motion only counts as a "first" petition under 28 U.S.C. § 2255, if the *pro se* petitioner was warned that the re-styled motion would have preclusive effect. *Id.* at 383-84. It is a sound rule.

But no Michigan court has ever cited *Castro*, and, being grounded in the Court's supervisory power over lower federal courts, it is not directly binding on them. *Id.* at 382-84. Michigan's Attorney General argues, nevertheless, that Michigan's courts will surely see *Castro's* wisdom, and thus this Court should dismiss Ruelas's claim and give them the opportunity to see if they want to adopt the rule for themselves. The AG further assures us that, if we took this action, he would argue for, not against,

adoption of the *Castro* rule, even though that would be against the state's interests at that point. Suffice to say that we cannot accept that argument. It is wholly speculative whether Michigan would adopt the *Castro* rule, as it is under no compulsion to do so. And we do not even know if Ruelas's claim would properly fit within it—Ruelas's motion to withdraw was re-styled as a motion for relief from judgment, but Michigan would have to delineate the contours of its own *Castro* rule based on Michigan procedure, of which this Court cannot claim any expertise. Moreover, dismissing Ruelas's case for this reason would suggest to Michigan's courts that they *must* adopt the *Castro* rule—that we were strong-arming them into adopting it because we, as federal judges, think it is a good idea. Yet that is for Michigan to decide. The state courts did not adopt the rule the first time Ruelas filed for relief, and there is little reason for us to think they have changed their minds. In any event, even if we take the Attorney General's offer as one made in good faith, it is not to our knowledge enforceable, and it is not for us to force that office's hand in a later stage of litigation, wholly apart from federal court. It is best for us to stay out of that speculative game. We hold that Ruelas exhausted his state court remedies, and that this appeal is properly before us.

Second, after the district court granted judgment in favor of Ruelas on his involuntary guilty plea claim, Michigan filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). Michigan then appealed this case to this Court two days later, and then re-filed its 60(b) motion with the district court. That motion sought

an evidentiary hearing into whether Ruelas's plea was voluntary, and the state submitted affidavits from the trial prosecutor and defense counsel. The district court has not yet acted on this 60(b) motion.

In its brief in this case, Michigan improperly relies on evidence it submitted when it filed its 60(b) motion. This evidence is not properly before us. First, the district court correctly did not rule on the 60(b) motion while this appeal remained pending, as it lost jurisdiction over it: "After an appeal of a trial court's final judgment has been perfected by the filing of a notice of appeal, the trial court no longer has jurisdiction to grant a Rule 60(b) motion." *Pickens v. Howes*, 549 F.3d 377, 381 (6th Cir. 2008). The district was free, however, to "indicate that it would grant the motion," which would allow the appellant to "make a motion in this court for a remand of the case so that the district court c[ould] grant relief." *Id.* at 383 (quoting *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 359 n.1 (6th Cir. 2001)). That did not happen here, and in any event, the grant of appeal in this case rendered the 60(b) motion—and any evidence attached thereto that was not part of this appeal—irrelevant to this case. Parties may not rely on evidence outside of the record, and that includes the evidence Michigan submitted with their 60(b) motion, which, as explained above, is treated as an entirely separate proceeding. Thus, because those documents were never introduced to either the state courts nor to the district court in this case, we may not consult those documents. And, for the reasons explained below, we do not need to consult that evidence to resolve this case.

III.

On a federal habeas appeal from a state court judgment, we review a district court's legal conclusions and mixed questions of law and fact de novo, and we review its factual findings for clear error. *Armstrong v. Morgan*, 372 F.3d 778, 781 (6th Cir. 2004); *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal court may not set aside a state judgment sustaining a prisoner's conviction without finding that the decision (1) is "contrary to," or an "unreasonable application" of, "clearly established federal law," or (2) was based on an "unreasonable determination of the facts in light of the evidence presented" to the state courts. 28 U.S.C. § 2254(d). A state court decision is "contrary to" established federal law if the state court arrived at a conclusion opposite to one reached by the Supreme Court on a question of law or if it decides a case differently than the Supreme Court on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court "unreasonably applied" clearly established federal law if it identified the correct legal principle but unreasonably applied that standard to the facts of the prisoner's case. *Id.* at 413. And although "clearly established federal law" in § 2254(d)(1) simply "refers to the holdings" of the Supreme Court, courts may look to the lower courts of appeals' decisions to inform the analysis of Supreme Court holdings in determining whether a legal principle has been clearly established by the Supreme Court. *Hereford v. Warren*, 536 F.3d 523, 528 (6th Cir. 2008)

(citing *Hill v. Hofbauer*, 337 F.3d 706, 716 (6th Cir. 2003)).

IV.

A defendant who pleads guilty waives a number of federal constitutional rights, including the right to a jury trial and the right to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Because of the importance of these rights, reviewing courts must ensure that the defendant's waiver was knowing and voluntary. We therefore insist that the defendant appreciated the consequences of the waiver, did so without coercion, and understood the rights surrendered. *Brady v. United States*, 397 U.S. 742, 748-50 (1970); *Fauntenberry v. Mitchell*, 515 F.3d 614, 636-37 (6th Cir. 2008). Specifically, guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748. The Supreme Court defines a voluntary plea as one "entered by one fully aware of the direct consequences." *Id.* at 755.

While a defendant need not know all the possible consequences of his plea, like the loss of his right to vote or own a gun, or the effect on future sentence, he must be aware of the maximum sentence to which he is exposed. *King v. Dutton*, 17 F.3d 151, 154 (6th Cir. 1994); *Hart v. Marion Corr. Inst.*, 927 F.2d 256, 259 (6th Cir. 1991). And, "[a]t a minimum, the defendant must understand the 'critical' or 'essential' elements of the offense to which he or she pleads guilty." *United States v. Valdez*, 362 F.3d 903, 909 (6th Cir. 2004) (citing *Bousley v. United States*, 523

U.S. 614, 618-19 (1998)). The satisfaction of these requirements cannot be inferred from the bare fact that the defendant pleaded guilty, because he still might not have known what he was giving up when he did so. *Boykin*, 395 U.S. at 243.

Ruelas argues that his guilty plea was invalid because, contrary to the plea's terms, manslaughter was not a permissible option during his "open murder hearing" under then-applicable Michigan law. (The law has since changed: were Ruelas to plead guilty to "open murder" today, manslaughter could be considered.) He argues that his plea was thus "involuntary" and that he should be permitted to withdraw it. In support, Ruelas contends both that Michigan law forbade manslaughter from being imposed, so the guilty plea should be held invalid on some kind of mutual mistake theory, and further that the circuit court never discussed manslaughter during his degree hearing, instead concluding that second-degree murder applied after ruling out first-degree murder. But things are not quite so simple.

[11] Michigan law was in flux when Ruelas pleaded guilty. It was not clear whether manslaughter was a lesser included offense of murder—and thus could be considered during an "open murder" hearing—or was not. Plea agreements may be held invalid if prosecutors, defense counsel, and the court are confused or mistaken as to the law, *Bousley*, 523 U.S. at 618-19, and so, Ruelas argues, his plea was invalid because the judge at his degree hearing was compelled by law to ignore manslaughter, *contra* to his plea. But maybe not: our Court has explained, under Michigan law in effect during this period, that "[i]f,

based on the evidence adduced at the [degree] hearing, the trial judge determine[d] that a conviction for manslaughter but not murder [wa]s warranted, the trial judge is required to refuse to accept the plea of guilty to the charge of murder[.]" *Berry v. Mintzes*, 726 F.2d 1142, 1144 (6th Cir. 1984) (citing *People v. Middleton*, 177 N.W.2d 652 (Mich. Ct. App. 1970)). So it is possible that manslaughter was still on the table as a practical matter, the only difference being that the judge was required to take the extra step of refusing the plea and institute a manslaughter conviction, rather than to do so directly and under the plea agreement. In any event, Michigan appears to have outgrown this temporary oddity and now manslaughter may be considered under an open murder plea because it is considered a "lesser included" or "inferior" crime to murder. *People v. Mendoza*, 468 Mich. 527, 664 N.W.2d 685, 694 (Mich. 2003).

Yet, even if we assume that Michigan law forbade the circuit court from considering manslaughter, it is ambiguous what it in fact considered; if it did consider manslaughter, even if that was contrary to the law at the time, then it is not clear what Ruelas lost. Indeed, the circuit court simply never used the word manslaughter, stating only:

> The Court could not find any specific intent in this case. The Court could not find a premeditated murder. And so, murder one is out. But, I do think that murder two was well demonstrated. The Defendant did great bodily harm to the victim knowing that he created a high risk of death, or great bodily harm

> knowing that death from such harm would like result [from] his actions. And so, the Court does make a finding [that] Mr. Ruelas is guilty of second-degree murder under the laws of this State.

It explained that it was sentencing Ruelas to second-degree rather than first-degree murder because he lacked premeditation. Ruelas argues, however, that the court's failure to distinguish manslaughter from second-degree murder, which the court found him guilty of, indicated that manslaughter was not considered. Yet, under Michigan law, the difference between second-degree murder and manslaughter is that a manslaughter conviction requires the defendant to show, by a preponderance of the evidence, that he killed in the "heat of passion," with such passion caused by "adequate provocation," without "a lapse of time during which a reasonable person could control his actions." *Mendoza*, 664 N.W.2d at 690. Morever, the presence of provocation was something Ruelas was required to prove, and the fact that the circuit court did not mention manslaughter does not automatically mean that it did not consider it; Ruelas offers little evidence of provocation.

The final sticky point is, even assuming that the judge could not consider manslaughter, whether that is legally sufficient to render his plea involuntary. On one hand, courts have focused on whether the defendant was aware of the maximum possible sentence, not the minimum. *Dutton*, 17 F.3d at 154. On the other, "plea bargains are essentially contracts[,]" *Puckett v. United States*, 129 S. Ct.

1423, 1430 (2009), and courts have long set those aside where the parties (here, the prosecutors and defendant), made a "mutual mistake," *e.g.*, *Raffles v. Wichelhaus*, 2 H. & C. 906 (Ex. 1864). Extending that reasoning here would mean that the plea was invalid because both sides did not know what they were bargaining for, as one of the plea's key elements—Ruelas's shot at getting only manslaughter—was not actually on the table. The district court did not discuss these concerns, and merely assumed that if Michigan could not sentence Ruelas to manslaughter then a violation occurred.

But we need not resolve these conundrums—both factual and legal—because the simplest way to resolve this case is to assume that Michigan either could not or did not consider manslaughter, and to further assume such error rendered Ruelas's guilty plea involuntary. We thus assume a constitutional violation, so the question is whether that violation was harmless or not.

V.

A.

Ruelas argues that a finding that his guilty plea was involuntary ought to end his case because all such errors are "structural." "Structural errors" are those that "defy" analysis by normal harmless error standards, *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), because their consequences "are necessarily unquantifiable and indeterminate," so reversal is "automatic." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Ruelas's case, however, neither "defies" harmless error standards nor is the harm "unquantifiable and indeterminate." His argument

otherwise relies on a faulty premise: that the remedy for all involuntary guilty pleas is the right to go back, plead innocent, and have a trial. That is sometimes the remedy, but not always, and not here. Habeas courts have "broad discretion" in crafting remedies for constitutional errors. *See Pickens*, 549 F.3d at 382. And, because guilty pleas are in the nature of contracts, *Puckett*, 129 S. Ct. at 1430, the remedy for Ruelas is specific performance of what he bargained for: a degree hearing where first-degree murder, second-degree murder, and manslaughter could all be considered. *E.g., Pickens*, 549 F.3d at 382 ("[W]e hold that it is unnecessary to permit a person to withdraw an illegal plea or require the state to retry a case when the defendant's sentence has been modified to make the sentence legal and to give the defendant every benefit of his bargain.").[1] Here, the "benefit of the bargain" is the opportunity to be considered for manslaughter, and that is the sort of analysis judges can perform during a harmless-error inquiry. So in this case, where Ruelas pleaded to "open murder" under Michigan

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[1] Ruelas also relies on the supposed semantic distinction between "structural" and "trial errors," arguing that because there was no trial in this case, the error must be structural. That does not follow. While it is true that errors susceptible to normal harmless error analysis are often colloquially referred to as "trial errors," *see, e.g., Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008); *Neder v. United States*, 527 U.S. 1, 15 (1999), the gravamen of the "structural error" inquiry is whether the error "defies" harmless-error analysis, and, for the reasons given above, the error here does not meet that test.

law, we can apply harmless error standards to determine whether the Michigan courts properly concluded that he was guilty of second-degree murder. The assumed error was not "structural."

B.

Determining whether an error is harmless on habeas review requires us to ask whether the error "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In this Circuit, *Brecht* is the standard for reviewing all (non-structural) errors on collateral review; it applies "whether or not the state appellate courts recognized the error." *Vasquez v. Jones*, 496 F.3d 564, 575 (6th Cir. 2007) (citing *Fry v. Pliler*, 551 U.S. 112, 117-18 (2007)). In *Fry*, the Supreme Court rejected the petitioner's argument that the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967) is appropriate on collateral review if the state court did not engage in a harmless error analysis. The Court held that habeas petitioners are not guaranteed one bite at the *Chapman* apple, and instead ruled that the *Brecht* standard flowed from principles of comity, federalism, and deference to state courts, and therefore applied on habeas review, *Fry*, 551 U.S. at 117-18.

The *Fry* Court also observed that post-*Brecht* developments (namely, the passage of the AEDPA) did not undermine *Brecht*, and that standard continues to apply today. *Id.* at 119-20. Yet the interplay of *Brecht* and the AEDPA is not always

straightforward. Here, the state courts first held that no constitutional violation occurred, but then also intimated that, even if Ruelas's plea had been unconstitutional, any error was non-prejudicial, though they did not discuss the issue at length or even cite *Chapman*. From experience, this is typical: state courts, in reviewing claims of prisoners, tend to state in their opinions, "Petitioner's claim of constitutional error fails on the merits, and, alternatively, any error would have been harmless." That the rulings in *Brecht* and *Fry* did not take this form was something of a fluke. The question then is: How does a federal habeas court review the decision of a state court that decided a constitutional error was harmless? Or when it is ambiguous if they performed such review at all? It will be recalled that, on habeas review, state court constitutional rulings—and *Chapman* was a constitutional case—are reversible only if the state decision was "contrary to" or an "unreasonable application of" clearly established federal law. 28 U.S.C § 2254(d)(1).

The answer in this Circuit is that *Brecht* is always the test, and there is no reason to ask both whether the state court "unreasonably" applied *Chapman* under the AEDPA and, further, whether the constitutional error had a "substantial and injurious" effect on the jury's verdict. *See, e.g., Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009); *Fleming v. Metrish*, 556 F.3d 520, 537 (6th Cir. 2009); *Vasquez*, 496 F.3d at 575. In coming to that conclusion, we take guidance from a passage in *Fry* stating that "it certainly makes no sense to require formal application of both tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the

former." 551 U.S. at 120. In other words, the determination of whether an error had a "substantially injurious" effect on the jury's verdict is broader and thus "subsumes" the question whether the state court reasonably applied *Chapman*. Before *Fry* was handed down, this issue had caused much consternation in the lower courts (including this one),[2] but the Supreme Court made clear its view with this passage in *Fry* (though the issue had not been heavily briefed, taking up but a single footnote in the Solicitor General's brief): *Fry* held that *Brecht* applies to all cases on collateral review, and a federal habeas court is never required to determine whether a state court's harmless error determination was "unreasonable" —*Brecht* handles the work on this, too.

Yet one of our sister circuits recently held otherwise. In *Johnson v. Acevedo*, 572 F.3d 398 (7th Cir. 2009), the Seventh Circuit held that habeas courts must always go through a two-step process:

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[2] Compare *Eddleman v. McKee*, 471 F.3d 576, 583 (6th Cir. 2006) ("AEDPA replaced the *Brecht* standard with the standard of *Chapman* plus AEDPA deference when ... a state court made a harmless-error determination."); *Gutierrez v. McGinnis*, 389 F.3d 300, 306 (2d Cir. 2004) ("The Supreme Court implicitly rejected *Brecht* as the proper lens for examining the harmlessness of constitutional errors on collateral review, at least where the state explicitly adjudicated a federal claim on harmless error grounds."); *with Inthavong v. LaMarque*, 420 F.3d 1055, 1061 (9th Cir. 2005) ("[B]oth the *Brecht* and the AEDPA/*Esparza* tests must be satisfied with respect to harmless error before relief can be granted.").

"If the state court has conducted a harmless-error analysis, the federal court must decide whether that analysis was a reasonable application of the *Chapman* standard. If the answer is yes, then the federal case is over.... If the answer is no ... then § 2254(d) drops out of the picture and the federal court must" apply the *Brecht* test. *Id.* at 404. The Seventh Circuit relied on *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam), to support this formulation. In *Esparza*, the Court held that a panel of this Circuit improperly applied the AEDPA when it failed to ask if a state court's determination that a constitutional error was unreasonable rather than simply incorrect. *Id.* at 16-17.

Although we agree with the Seventh Circuit that "*Fry* did not overrule *Esparza*," *Johnson*, 572 F.3d at 404, the two cases may be harmonized more simply than does the Seventh Circuit. We believe the *Johnson* court misreads *Esparza* insofar as it thinks that courts must always go through this two-step inquiry. Of course, *Esparza* says that if a state court's harmless error determination was reasonable, then a federal court has no authority to grant the writ. But in *Fry* the Justices also told us that *Brecht's* "substantially injurious" test "obviously subsumes" the question whether *Chapman* was reasonably applied: How could the determination that something was harmless beyond a reasonable doubt be *unreasonable* if it did not also have a "substantially injurious" effect on the jury? Moreover, because "it certainly makes no sense to require formal application of both tests (AEDPA/*Chapman* and *Brecht*)," *Fry*, 551 U.S. at 120, *Fry*, as a practical matter, "subsumes" *Esparza*. But again:

Esparza was not overruled. Per that case, a habeas court remains free to, before turning to *Brecht*, inquire whether the state court's *Chapman* analysis was reasonable. If it was reasonable, the case is over. But in *Fry* the Justices also emphatically stated (there was no dissent regarding this point), that a habeas court may go straight to *Brecht* with full confidence that the AEDPA's stringent standards will also be satisfied.

C.

So the *Brecht* test applies. Ruelas flunks it. Assuming that the state courts unreasonably applied federal law in determining that Ruelas's plea was not improper, the inquiry becomes whether the circuit court's failure to consider manslaughter "had a substantial and injurious effect or influence" on the determination that he was guilty of second-degree murder. *Brecht*, 507 U.S. at 623. In other words, the question is whether Ruelas was prejudiced such that he lost a legitimate chance to be sentenced to manslaughter rather than second-degree murder. The burden for showing an error to be harmless is on the government, *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995), though on habeas review judges independently review the facts supporting the judgment themselves; but the scale, if equal, tips in favor of the defendant, *id.* at 435-36.

In Michigan second-degree murder requires the government to prove that there was (1) a "death, (2) caused by the defendant's act," (3) the act was done "with malice, and (4) without justification." *Mendoza*, 664 N.W.2d at 689. The "malice" required by second-degree murder is (1) an "intent to kill," (2) an intent

to cause great bodily harm," or (3) an "intent to do an act in wanton and willful disregard" of a high chance that it would "cause death or great bodily harm." *People v. Goecke*, 457 Mich. 442, 579 N.W.2d 868, 878 (Mich. 1998). The only difference between second-degree murder and manslaughter is the "malice" element (first-degree murder differs from second in that it requires premeditation). A defendant is guilty only of manslaughter if he "killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Mendoza*, 664 N.W.2d at 690. Although the government must prove harmless error-and the state must always prove its case beyond a reasonable doubt-the burden of proof to show provocation, however, is on the defendant, and it must be shown by a preponderance of the evidence. *People v. Darden*, 595 N.W.2d 27, 31 (Mich. Ct. App. 1998) ("Provocation, or the absence of provocation, is not an element of the prosecutor's case.").

Ruelas's only support for his contention that he merited only manslaughter and not second-degree murder, was that his mother provoked him when she slapped him across the face and told him not to refer to his ex-wife as a "bitch." J.A. 217. This is not powerful evidence. Moreover, that the circuit court, at the degree-hearing, did not explicitly "rule out" manslaughter is of no moment because it was not the government's burden to prove it. And, we believe, had the judge considered manslaughter at Ruelas's degree hearing, he would have still been found guilty of second-degree murder because he proffered no evidence establishing sufficient "provocation" under

Michigan law. As a result, the failure to consider manslaughter did not have a substantial and injurious effect on Ruelas's chance of receiving a manslaughter charge, as the charge of second-degree murder was well supported and Ruelas offered little evidence of provocation.

VI.

For the above reasons, we REVERSE the district court's judgment and vacate the order to issue the conditional writ of habeas corpus.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DAVID RUELAS,

Petitioner, Case No. 06-CV-11994

v.

HUGH WOLFENBARGER, HON. DENISE PAGE HOOD

Respondent.

_____/

OPINION AND ORDER 1) CONDITIONALLY GRANTING PETITIONER'S WRIT OF HABEAS CORPUS & 2) DENYING PETITIONER'S MOTION FOR EVIDENTIARY HEARING AS MOOT

Petitioner John David Ruelas has filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner, who is currently incarcerated at the Standish Maximum Correctional Facility in Standish, Michigan, challenges his second-degree murder conviction. For the reasons, set forth below, the Court conditionally grants the petition.

I. Background

Petitioner's conviction arises out of the January 24, 2002 beating death of Margaret Ruelas, his seventy-six year old mother. On July 17, 2002, Petitioner pleaded guilty to open murder in exchange for the dismissal of a second felony offender charge.

Following a degree hearing, Petitioner was found guilty of second-degree murder. He was sentenced to 250 months to 40 years of imprisonment.

Petitioner filed an appeal in the Michigan Court of Appeals. The Michigan Court of Appeals dismissed the appeal for lack of jurisdiction. *People v. Ruelas*, No. 243446 (Mich. Ct. App. Sept. 17, 2002).

Petitioner filed a motion to withdraw his guilty plea in the trial court. The trial court denied the motion on January 5, 2004. *People v. Ruelas*, No. 02-000770-FC (Jackson County Cir. Ct. Jan. 5, 2004).

Petitioner then filed another motion to withdraw his plea in the trial court. The trial court construed the motion as a motion for relief from judgment and denied the motion. *People v. Ruelas*, No. 02-000770-FC (Jackson County Cir. Ct. Jan. 9, 2004).

Petitioner filed a delayed application for leave to appeal in the Michigan Court of Appeals, seeking to appeal the trial court's denial of his motion to withdraw plea. The application was denied. *People v. Ruelas*, No. 253463 (Mich. Ct. App. Mar. 3, 2004). Petitioner then filed an application for leave to appeal in the Michigan Supreme Court which was denied. *People v. Ruelas*, 471 Mich. 927 (2004).

Petitioner filed a second application for leave to appeal in the Michigan Court of Appeals, this time seeking to appeal the trial court's denial of his second motion to withdraw guilty plea, which was construed by the trial court as a motion for relief from judgment. The Michigan Court of Appeals denied leave to appeal. *People v. Ruelas*, No. 260055 (Mich. Ct. App. July 29, 2005). Petitioner filed an application for leave to appeal in the Michigan

Supreme Court, which was also denied. *People v. Ruelas*, 474 Mich. 1067 (2006).

While the second application for leave to appeal was pending before the Michigan Supreme Court, Petitioner filed a motion for acquittal in the trial court. The trial court denied the motion. *People v. Ruelas*, No. 02-000770-FC (Jackson County Cir. Ct. Dec. 14, 2005).

Petitioner then filed the pending petition for a writ of habeas corpus, presenting the following claims:

> I. Petitioner's lower court counsel and appellate counsel were ineffective within the meaning of Const. 1963, Art. 1, §20, and the Sixth Amendment to the United States Constitution.
>
> II. Petitioner's statement to Detective Schutte was coerced by physical violence and threats of physical violence. Trial counsel was ineffective for failing to raise this issue which created an involuntary plea.
>
> III. Was Petitioner harmed by error to advise the petitioner that the trial court could consider convicting the Petitioner of manslaughter at the degree hearing?
>
> IV. Was Petitioner harmed when the trial court committed error when it did not advise the Petitioner that he would be giving up a constitutional right of his right to appeal?

> V. The trial court erred in scoring prior record variable at 25 points resulting in defendant's sentence being improperly enhanced on that basis, and the basis of factual findings not admitted by his plea, *i.e.*, the scoring of offense variables, contrary to his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process.

Respondent filed a motion to dismiss the petition on the ground that the petition contained unexhausted claims. The Court denied the motion, because no avenue remained available for Petitioner to present his unexhausted claims. He had already filed a motion for relief from judgment in state court, and the Michigan Court Rules prohibit parties from filing second or successive motions for relief from judgment. *See*, Mich. Ct. R. 6.502(G)(1). The Court directed Respondent to file an answer addressing the claims presented in the petition. Respondent has now filed an Answer and Petitioner has filed a Reply.

II. Motion for Evidentiary Hearing

Petitioner has filed a Motion for Evidentiary Hearing. Rule 8, Rules Governing Section 2254 Cases in the United States District Courts states, in pertinent part:

> If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall upon a review of those proceedings and of the

> expanded record, if any, determine whether an evidentiary hearing is required.

See, Rule 8, Rules Governing Section 2254 Cases. In addition, the federal court may conduct an evidentiary hearing only if the facts underlying the claim, if true, would establish a constitutional error. *Sawyer v. Hofbauer*, 299 F.3d 605, 610 (6th Cir. 2002).

Based upon the analysis that follows, the Court finds that an evidentiary hearing is unnecessary for a just resolution of Petitioner's claims.

III. Discussion

A. Standard of Review

28 U.S.C. § 2254(d) imposes the following standard of review on federal courts reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the

> evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Under Section 2254(d), federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis*, 144 F.3d 429 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1)[1]; *see also Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous[.]").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .

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[1] 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 529 U.S. 362, 405-06 (2000).

With respect to the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." *Id.* at 409. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under 28 U.S.C. § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law

> erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 409-11.

B. Alleged Ineffective Assistance of Trial and Appellate Counsel

In his first and second claims for habeas corpus relief, Petitioner argues that his trial and appellate counsel were ineffective. Petitioner argues that trial counsel was ineffective in: (i) failing to file a motion to suppress his confession; (ii) failing to adequately explain the rights Petitioner would forfeit by pleading guilty, (iii) and failing to correctly advise Petitioner that the trial judge would not consider the offense of manslaughter at the degree hearing.

Respondent argues that Petitioner's claims of ineffective assistance of counsel are procedurally defaulted. The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files

an untimely appeal, *Coleman*, 501 U.S. at 750, if he fails to present an issue to a state appellate court at his only opportunity to do so, *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, *e.g.*, to make a contemporaneous objection, or file a motion for a directed verdict. *United States v. Frady*, 456 U.S. 152, 167-69 (1982); *Simpson v. Sparkman*, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." *Rust*, 17 F.3d at 162; *see also Murray v. Carrier*, 477 U.S. 478, 496 (1986).

For the doctrine of procedural default to apply, a firmly established state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that state procedural rule. *Warner v. United States*, 975 F.3d 1207, 1213-14 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. *Coleman*, 501 U.S. at 729-30.

This Court begins its analysis of whether Petitioner's claims are procedurally defaulted by looking to the last reasoned state court judgment denying Petitioner's claims. *See Coleman*, 501 U.S. at 729-30. The Michigan Supreme Court, the last state court to address these claims, which were presented for the first time on collateral review,

denied leave to appeal because Petitioner "failed to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D)." *People v. Ruelas*, No. 129271 (Mich. Nov. 29, 2005).

The Sixth Circuit Court of Appeals has held that M.C.R. 6.508(D) is a firmly established and regularly followed state ground precluding subsequent federal habeas review absent a showing of cause and prejudice where the rule was in effect at the time of a petitioner's direct appeal. *Luberda v. Trippett*, 211 F.3d 1004, 1007 (6th Cir. 2000) (citing *Rogers v. Howes*, 144 F.3d 990 (6th Cir. 1998)). M.C.R. 6.508(D) was enacted in October 1989. Petitioner was convicted in 2002. Thus, M.C.R. 6.508(D) was firmly established and regularly followed state procedural bar at the time of Petitioners' conviction. The Sixth Circuit Court of Appeals has also held that even a judgment as brief as the one by which the Michigan Supreme Court denied leave to appeal in this case is sufficient to invoke the doctrine of procedural default. *Ivory v. Jackson*, 509 F.3d 284, 292-93 (6th Cir. 2007); *Simpson v. Jones*, 238 F.3d 399, 408 (6th Cir. 2000). Accordingly, the state court's judgment clearly rested on a procedural bar and the doctrine of procedural default is invoked.

This Court may not review Petitioner's claims unless he has established cause for the default and actual prejudice as a result of the alleged violation of federal law or unless he has demonstrated that failure to consider these claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

Petitioner also asserts that his appellate attorney was ineffective in failing to raise these claims on direct review. The Supreme Court has held that a petitioner does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 754 (1983). The Court further stated:

> For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the . . . goal of vigorous and effective advocacy. . . . Nothing in the Constitution or our interpretation of that document requires such a standard.

Id. at 754. Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." *United States v. Perry*, 908 F.2d 56, 49 (6th Cir. 1990). The last state court to issue an opinion regarding Petitioner's ineffective assistance of appellate counsel claim, the Michigan Supreme Court, held that this claim also was barred from review because Petitioner "failed to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D)." *People v. Ruelas*, No. 129271 (Mich. Nov. 29, 2005).

Here, Petitioner fails to allege any cause to excuse the procedural default of his ineffective assistance of trial counsel and appellate counsel claims. These claims are procedurally defaulted unless Petitioner can establish that a constitutional

error resulted in a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298 (1995).

The Supreme Court has explicitly tied the miscarriage of justice exception to a petitioner's claim of innocence. *Schlup v. Delo*, 513 U.S. at 321. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." *Id.* In other words, a petitioner must assert a constitutional error along with a claim of innocence. *Id.* Here, Petitioner has not supported his allegation of constitutional error with new reliable evidence of actual innocence. Accordingly, Petitioner's claims that his constitutional rights were violated by the ineffective assistance of trial counsel and appellate counsel are procedurally barred.

C. Voluntariness of Petitioner's Custodial Statement

Petitioner argues that his custodial statement was coerced, because the interrogating police officer physically assaulted him and threatened further abuse. This argument fails, however, because Petitioner submitted a guilty plea to open murder. A guilty plea waives any non-jurisdictional, constitutional challenge a petitioner might have; the petitioner may attack only the nature of his plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

> [A] guilty please represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly

> admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Id. Petitioner's "guilty plea prevents any collateral challenge to the voluntariness of his confession." *McCann v. Trombley*, 2007 WL 2318730, *3 (E.D. Mich. Aug. 10, 2007) (citing *United States v. Wright*, 873 F.2d 437, 442 (1st Cir. 1989); *Rogers v. Maggio*, 714 F.2d 35, 38 (5th Cir. 1983); *United States v. Montoya-Robles*, 935 F.Supp. 1196, 1204 n. 5 (D. Utah 1996)).

D. Voluntariness of Plea

Petitioner argues that his plea was involuntary because: (i) his plea was based upon the mistaken advice that manslaughter would be considered at the degree hearing; (ii) the trial court failed to inform him that a second-degree murder conviction would not result in a sentence of probation; and (iii) the trial court failed to inform him that a guilty plea waived his right to an appeal as of right.

The Supreme Court has held that, to be valid, a guilty plea must be voluntarily and intelligently made. *Brady v. U.S.*, 397 U.S. 742, 748-49 (1970). To be voluntary and intelligent, the plea must be made "with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 748. The voluntariness of a plea "can be determined only by considering all of the relevant circumstances surrounding it." *Id.* at 749. A "plea of guilty

entered by one fully aware of the direct consequences" of the plea is voluntary in a constitutional sense, and the mere fact that the defendant "did not correctly assess every relevant factor entering into his decision" does not mean that the decision was not intelligent. *Id.* at 755, 757. For a defendant's plea of guilty to be voluntary, the defendant "must be aware of the maximum sentence that could be imposed." *King v. Dutton*, 17 F.3d 151, 154 (6th Cir. 1991)). Additionally, the defendant must at lease have a "sufficient awareness of the relevant circumstances and likely consequences" of his plea. *Hart*, 927 F.2d 257.

1.

Petitioner argues that he is entitled to habeas relief, because the state trial court misinformed him that he could be found guilty of manslaughter under the open murder statute.[2] Although a judge or jury may now consider the offense of manslaughter under Michigan's open murder statute, *People v. Mendoza*, 468 Mich. 527, 529 (2003), this was not the case at

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[2] Although Respondent argues that this claim is procedurally defaulted, (Answer at 9-12,) the Court does not agree. Petitioner timely filed his motion to withdraw his plea in the state trial court pursuant to MCR 6.310(C). *See People v. Podlaszuk*, 480 Mich. 866, 866 (2007) (noting that a defendant's MCR 6.310(C) motion is timely if it is filed within 12 months after the appointment of his appellate counsel, so long as his appellate counsel was appointed on or before December 31, 2005). Here, Petitioner's appellate counsel was appointed on July 16, 2003. (Dkt. #12 at 5.) His first motion to withdraw his plea was filed on July 18, 2003. (*Id.*)

the time of Petitioner's July 17, 2002 plea. *People v. Watkins*, 468 Mich. 233, 238 (2003). The Court therefore analyzes this claim under the harmless error standard set forth in *Fry v. Piller*, __ U.S. ___, 127 S. Ct. 2321 (2007). *Wilson v. Mitchell*, 498 F.3d 491, 503 (6th Cir. 2007). The standard for determing whether the error was harmless is "whether the guilty verdict actually rendered in . . . [Petitioner's] trial was surely unattributable to the error." *Id.* at 504; *see also Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (noting that habeas relief may be granted only where the error had substantial and injurious effect or influence on the outcome of the case).

In the present case, the Court cannot conclude that outcome of Petitioner's case was unattributable to the trial court's error. Petitioner indicated in his state court motion to withdraw his guilty plea that he would have pled guilty to open murder if he had known that his plea to open murder would have precluded the trial judge's consideration of a manslaughter conviction. (Dkt. #24 at 45.) Moreover, even though the trial court indicated at the July 17, 2002 plea hearing that it would consider the offense of manslaughter with respect to Petitioner's open murder plea, (Dkt. #14 at 6,) there is no indication in the record of the August 2, 2002 degree hearing that the trial court considered manslaughter during its deliberation. (Dkt. #18 at 3-4.) The trial court judge did not explicitly reference manslaughter in announcing his finding of second-degree murder. (*Id.*) That the evidence against Petitioner supported a finding of second-degree murder does not make the trial court's error harmless. *See Wilson*, 498 F.3d at 504 (noting that

the *Fry* and *Brecht* inquiries are not "whether, in a trial that occurred without the errors, a guilty would surely have been rendered"). Accordingly, Petitioner is entitled to habeas relief on this claim. *See Bousley v. United States*, 523 U.S. 614, 618-19 (1998) (noting that if neither defendant, nor his counsel, nor the trial court correctly understood the crime with which defendant was charged, defendant's guilty plea is constitutionally invalid).

2.

Petitioner argues that he is entitled to habeas relief, because the state trial court did not inform him that a second-degree murder conviction would not result in a sentence of probation. This argument lacks merit, because a defendant need only be informed of his maximum possible sentence. *Hart*, 927 F.2d at 259; *Pitts v. US*, 763 F.2d 197, 201 (6th Cir. 1985). Here, the record indicates that Petitioner was aware of his maximum sentence. At Petitioner's plea hearing, the court informed Petitioner that his maximum possible sentence, if convicted of first-degree murder, was "life without parole." (Dkt. #14 at 6.) The court subsequently asked Petitioner if he understood this maximum possible sentence. (*Id.*) In response, Petitioner replied, "Yes, sir." (*Id.*) Based upon his in-court statements, Petitioner is precluded from raising a claim that he did not understand this maximum possible sentence. (*Id.*) Based upon his in-court statements, Petitioner is precluded from raising a claim that he did not understand the possible sentences which were associated with his plea. *See Ramos v. Rogers*, 170 F.3d 560, 564 (6th Cir. 1999) (a petitioner

challenging the voluntariness of his guilty plea is bound by his in-court statements).

Petitioner argues that he is entitled to habeas relief, because the state trial court failed to inform him that a guilty plea waived his right to an appeal of right. This argument also lacked merit. While the trial judge did not give Petitioner the advice required by Mich. Ct. Rule 6.302(B)(5) that "any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right," there is no authority that such advice is required under the federal constitution. Petitioner was advised that he was waiving the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination, as constitutionally required under *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). (*See* Dkt. #14 at 8-9.)

E. Scoring of Offense Variables

Petitioner claims that he is entitled to habeas corpus relief because the trial court incorrectly scored certain offense variables and improperly increased his sentence in reliance upon facts not presented at the plea or sentencing hearings in violation of the Sixth Amendment and Fourteenth Amendment. *See Blakely v. Washington*, 543 U.S. 296, 303-05 (2004) (state trial court's action in sentencing defendant beyond the statutory maximum of the standard range for his offense based upon judicial finding of deliberate cruelty violated Sixth Amendment right to trial by jury).

To the extent that Petitioner challenges the scoring of his offense variables under state law, he is not entitled to relief. "[A] state court's interpretation

of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting on habeas review." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). "[S]tate courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). *See also*, *Thomas v. Foltz*, 654 F. Supp. 105, 106-07 (E.D. Mich. 1987) (holding that where petitioner seeks relief on the basis of a trial court's application of state sentencing guidelines, petitioner's claim is not cognizable on habeas review); *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) (holding that "federal courts cannot review a state's alleged failure to adhere to its own sentencing procedures").

Nor is Petitioner entitled to relief on his claim that the trial court increased his sentence in reliance upon facts not found by a jury, in violation of the Sixth and Fourteenth Amendments. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Michigan has an indeterminate sentencing system for most crimes, including causing the death of another person while operating a motor vehicle under the influence of intoxicants. The maximum term of imprisonment is set by law. Mich. Comp. Laws § 769.8(1); *See also People v. Drohan*, 475 Mich. 140, 160-61 (2006). In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court addressed indeterminate sentencing systems and held that such systems do not violate the Sixth Amendment. The Court explained:

> [The Sixth Amendment] limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involved judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence-and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence-and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found buy a jury.

Blakely, 542 U.S. at 308-09.

Judicial factfinding may not be used to impose a sentence "beyond the prescribed statutory

maximum." *Apprendi*, 530 U.S. at 490. Under Michigan law, the maximum sentence for second-degree murder is life or any number of years. Mich. Comp. Laws § 750.317. The sentencing court did not impose a sentence beyond the statutory maximum. Therefore, the sentencing scheme did not run afoul of the Sixth Amendment. Because *Blakely* does not apply to indeterminate sentencing schemes like the one utilized in Michigan, the trial court's sentence did not violate Petitioner's constitutional rights. *See Tironi v. Birkett*, No. 06-1557, 2007 WL 3226198, * 1 (6th Cir. Oct. 26, 2007) ("*Blakely* does not apply to Michigan's indeterminate sentencing scheme."). Petitioner's improper sentence is without merit.

IV. Conclusion

For the foregoing reasons,

IT IS ORDERED that Petitioner's Petition for Writ of Habeas Corpus (Docket No. 1) is conditionally **GRANTED**.

IT IS FURTHER ORDERED that Respondent take action to afford Petitioner a new trial within ninety (90) days of the date of this Order. If a new trial is not scheduled within ninety (90) days, Petitioner may apply for a write to release Petitioner from custody.

IT IS FURTHER ORDERED that Respondent serve a copy of this Opinion and Order to the appropriate State Court and Prosecuting Attorney within ten (10) days' receipt of this Opinion and Order. A proxy of service must be filed by Respondent.

IT IS FURTHER ORDERED that Petitioner's Motion for Evidentiary Hearing [dkt. #39] is **DENIED AS MOOT**.

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: March 31, 2008

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 31, 2008, by electronic and/or ordinary mail.

S/William F. Lewis
Case Manager

STATE OF MICHIGAN
4TH JUDICIAL CIRCUIT (JACKSON COUNTY)

FILED
JUL 31 2006
CLERK'S OFFICE
DETROIT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs- Docket No. 02-0770-FC

JOHN DAVID RUELAS,

Defendant.

_____/

VIDEO HEARING

BEFORE THE HONORABLE ALEXANDER C. PERLOS, CIRCUIT COURT JUDGE

Jackson, Michigan --

APPEARANCES:

For the Plaintiff: Allison Bates (P45282)
312 S. Jackson St.
Jackson, MI 49201
(517) 788-4283

For the Defendant: Wendell Jacobs, Jr. (P15406)
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WITNESSES: PLAINTIFF

None.

EXHIBITS: IDENTIFIED RECEIVED

None.

Jackson, Michigan

July 17, 2002 - Tape shows 10:58:16

THE COURT: Okay. We're on the record in People verses Ruelas. I understand this is a plea. Any -- in this matter?

MS. BATES: Yes, Your Honor. Mr. Jacobs and I have discussed this with the Court on a couple of occasions, and the conclusion we've reached with regard to disposition on this case is, as I understand it, today Mr. Ruelas will enter a plea to the Count I as charged, which is a charged as a open murder. What obviously proceeds after that is then the degree hearing. Currently, we are set for trial on July 29. Mr. Jacobs and I indicated to the Court we would then like to do the degree hearing on the 29th of July, and we've discussed with the Court the witnesses that will be presented at that and the probable length of that hearing. So, today, it would just be the plea followed by the degree hearing on the 29th.

THE COURT: Okay. All right. You want to stand, Mr. Ruelas, and be sworn by the clerk.

CLERK: Raise your right hand please. Do you solemnly swear the testimony you're about to give will be the truth, the whole truth and nothing but the truth, so help you God?

MR RUELAS: So help me God.

THE COURT: Okay. Read the information then, Ms. Bates.

MS BATES: Thank you, Your Honor. On or about January 24, in the year 2002, in the County of Jackson, John David Ruelas did murder Margaret

Ruelas contrary to MCL 750.316. This is a felony punishable by life. And the People will not be proceeding on the habitual, provided we get to the degree hearing, Your Honor.

THE COURT: All right. So, Mr. Jacobs, how will your client be pleading?

MR. JACOBS: Judge, we are going to tender a plea of guilty with the understanding that there would be the degree hearing to establish whether this was first, second degree or manslaughter, one of those three degrees.

THE COURT: Okay.

MR. JACOBS: Also, we -- and I would note, if the plea is accepted at this point, for the hearing, we have discussed that I would be stipulating to the DNA lab report and the prosecutor will be presenting three witnesses, being the medical examiner, Office Gross (phonetic) and Detective Schuette (phonetic).

THE COURT: All right.

MR. BATES: In addition, Your Honor, we would stipulate as to the identity of the deceased.

MR. JACOBS: Correct. We've stipulated that it was Margaret Ruelas.

MS. BATES: And I have agreed, for Mr. Jacobs, Mr. Jacobs presented me, there was a -- a literal -- a large stack of medical records. Mr. Jacobs has presented me with the pages that he requested a stipulation from me for, and I have agreed with him that we will stipulate to those medical records, as well.

THE COURT: All right.

MS. BATES: At the time of the hearing for the purposes of submission at the hearing.

THE COURT: Mr. Ruelas, do you understand what the attorneys are saying?

MR. RUELAS: Not all the legal[ese], but basically, yes, I do.

THE COURT: Basically, you understand it?

MR. RUELAS: I do, Your Honor.

THE COURT: I want you to, if you have any questions at all, to bring it up. I'd try to help answer them for you.

MR. RUELAS: I appreciate that.

THE COURT: If you have any questions at all about the whole proceeding. It's a little extraordinary, your proceeding. It's not a normal guilty plea, as I understand it. But, it's a proceeding where I make the determination as to what degree it is.

MR. RUELAS: Yes, sir.

THE COURT: And I -- and I've done this before. The degree -- I think maybe two three other times. Now, you've heard what your attorney and the prosecutor has said, how do you wish to plead to the charge?

MR. RUELAS: Guilty, Your Honor.

THE COURT: Okay. I also want to explain to you, before you do that, I'm sure your attorney has explained it to, Mr. Ruelas. You could be found guilty of first degree murder, which is life without parole. Do you understand that? It's imprisonment for the rest of your natural life without ever getting

out. On first degree. Second degree is life, and parole is possible. Do you understand that?

MR. RUELAS: Yes, sir.

THE COURT: Third -- The third factor that I can find, the third one would be manslaughter which is up to 15 years in prison. So, there's three things that I might find -- find you of. One of the three. It could be life without parole, if it's first degree murder. If it's second degree murder, it's life with a possibility of parole. And then the last one is manslaughter which is up to 15 years in prison. Now, I want to ask you again, knowing all that, and I don't think it matters any, I don't think you were on probation or anything . . .

MR. RUELAS: No, sir.

THE COURT: . . . when this happened; but . . .

MR. RUELAS: No, sir.

THE COURT: . . . knowing all that, again, I want to ask you, how do you wish to plea? Because, this is a very extreme[ ] charge.

MR. RUELAS: I understand, Your Honor. Can I have a quick --

THE COURT: Sure.

MR. RUELAS: Can I have a quick moment with my counsel?

THE COURT: Sure.

MR. RUELAS: I apologize for the delay, Your Honor.

THE COURT: It's okay. Do you have any further questions for me or him?

MR. RUELAS: Currently, no, Your Honor.

THE COURT: Okay. How do you wish to plead to the charge then, after I explained to you what the penalties are for these offenses?

MR. RUELAS: Guilty, Your Honor.

THE COURT: All right. Before your plea of guilty is accepted, I must advise you, you will not have a trial of any kind, that you would give up certain important rights guaranteed to you by the Constitution -- State of Michigan and the United States. You'd give up your right to a trial by jury, or trial by the Court, if you do not want a trial by jury. When I say trial by the Court, I mean a trial before a judge who will determine the facts and render a verdict without a jury. Do you understand that right?

MR. RUELAS: Yes, sir.

THE COURT: You have a right to be presumed innocent until proven guilty beyond a reasonable doubt. The burden of proof would be on the prosecution throughout the trial. By the plea which you have tendered to the Court, you give up your to be presumed innocent of this offense. You also give up your right to present any defenses you might have with the offense with which you were charged. Do you understand that right?

MR. RUELAS: I do, Your Honor.

THE COURT: By your plea of guilty, you give up your right to confront your accusers. That is to have the witnesses against you appear and question any witnesses who would appear at trial and testify

against you, as there would be no trial. Do you understand that right?

MR. RUELAS: I do.

THE COURT: And trial, you have a right to obtain witnesses in your favor or have the Court order the appearance of any defense witnesses whom you or your lawyer might wish to question. Do you understand that right?

MR. RUELAS: Yes, sir.

THE COURT: At a trial, you have a right to testify in your own defense, or remain silent if you might choose. And if you were to remain silent, the prosecutor could not comment to the jury or to the court on your failure to testify and your silence can not be used against you. Do you understand that right?

MR. RUELAS: Yes, sir.

THE COURT: Do you understand then all the rights I've just related to you?

MR. RUELAS: Yes, sir.

THE COURT: Do you understand by pleading guilty you're giving them all up? Do you understand that?

MR. RUELAS: Yes, sir.

THE COURT: You do? All right. Now, there's no really -- there's no plea agreement in this case, as I understand it, of any kind, isn't that correct?

MS. BATES: The People won't proceed on the habitual, Your Honor, after --

THE COURT: Oh, I see.

MS. BATES: -- after the degree hearing, depending on what the Court does.

THE COURT: Okay.

MS. BATES: We're not seeking a habitual --

THE COURT: The habitual is out. Is that -- is that the full extent of the plea agreement, Mr. Jacobs?

MR. JACOBS: Yes, it is, Judge.

THE COURT: Do you understand what we're talking about Now, about the habitual offender, Mr. Ruelas?

MR. RUELAS: I understand, unless I misunderstood Ms. Bates incorrectly, that they won't proceed with the habitual charge.

THE COURT: Right. They're not going to proceed with that. That's being dropped. Okay. If that's the full extent of that, and there's no other deal, has anyone else told you that you're going to get any kind of other -- another deal?

MR. RUELAS: No, sir.

THE COURT: Anyone made any other kind of promises to you?

MR. RUELAS: No, sir.

THE COURT: Anyone -- any pressure or threats to get you to plead guilty?

MR. RUELAS: No, sir.

THE COURT: Is this plea then of your own choice?

MR. RUELAS: It is, Your Honor.

THE COURT: Okay. Have you discussed the plea and its consequences with your attorney?

MR. RUELAS: I have.

THE COURT: And are you satisfied with Mr. Jacobs as your attorney?

MR. RUELAS: Very much so.

THE COURT: And are you pleading guilty here today because you feel it's your best interest do so, even though I just your -- your constitution rights of trial, etcetera? You still think it's in your best interest to plead guilty?

MR. RUELAS: I do.

THE COURT: All right. In order for the Court to be able to accept your plea, I have to be satisfied this offense in fact took place. It's -- necessary that you tell me how you accomplished this homicide, Mr. Ruelas. How did you kill your mother?

MR. RUELAS: That's a very -- that's a very complicated question, Your Honor.

THE COURT: I realize that. And I realize it's -- it's tough for you, Mr. Ruelas, but I have to know how you did this. I understand that there weren't any weapons used?

MR. RUELAS: No, sir.

THE COURT: What happened?

MR. RUELAS: Forgive me, Your Honor.

THE COURT: Sure.

MR. RUELAS: Thank you, Your Honor. Prior to January 24, I'm going to explain this, Your Honor, the best I'm able to.

THE COURT: Sure, go right ahead.

MR. RUELAS: Thank you. The -- the events that brought us, when I say us, I mean my mother and I, to Jackson is I reconciled with my daughter's mother briefly. And my mother and I were relatively new to Jackson. It was the last two years. And I preface this, Your Honor, I don't mean to imply or to suggest that anyone or anything is responsible for the passing of my mother other than myself. I want that made clear. I don't want it to be said later that I stood before you and attempted in any manner to blame anyone else or anything else other than myself. I take full responsibility. The -- the circumstances that surrounded my mother's passing, my mother's death, fall to me. I could stand before you and say it was an unbearable amount of pressure in the fight and in the struggle to keep my daughter. I could say that and I will say that because it's true. It's been suggested that my mother wavered in her support for me to attempt in retaining joint physical custody of my daughter. It's been suggested by people who didn't know my mother. That's highly inaccurate. My mother supported me in my fight to keep my daughter. My mother supported me in every endeavor that I pursue, personally and professionally. What I did on January 24 was commit the ultimate betrayal, the most egregious betrayal that one can afflict upon another person. It was not intentional. It was unpremeditated. It was undeliberate, if that's no[t] redundant. I struck my mother. And if I'd a thought for one moment, for one millisecond that her life was in danger, I would have summoned for help prior to when I did. I'm sorry for the lengthy answer, Your Honor.

THE COURT: Okay. You did strike your mother. How did you strike your mother?

MR. RUELAS: With my open hand.

THE COURT: A slap or -- is that what you're saying?

MR. RUELAS: Yes, sir.

THE COURT: Was it across the face?

MR. RUELAS: I believe so, Your Honor.

THE COURT: And did you knock her down?

MR. RUELAS: She fell.

THE COURT: She fell. How much do you weigh?

MR. RUELAS: At that time?

THE COURT: Yeah.

MR. RUELAS: Roughly two and a quarter?

THE COURT: Two and a quarter?

MR. RUELAS: Roughly.

THE COURT: How tall are you?

MR. RUELAS: I'm 6'1", 6 foot, 6'1".

THE COURT: How old -- what was the size of your mother?

MR. RUELAS: My mother was 5'1".

THE COURT: How much did she weigh about, at that time?

MR. RUELAS: Roughly 150 pounds, 160 pounds.

THE COURT: How old was your mother?

MR. RUELAS: 76 years old.

THE COURT: Okay. I'm not sure if I asked you, Mr. Ruelas, but did I ask you how old you are presently? I don't think I did.

MR. RUELAS: You didn't, Your Honor, no.

THE COURT: How old are you Now?

MR. RUELAS: I'm 37, Your Honor.

THE COURT: And how much schooling have you had?

MR. RUELAS: I completed the second grade, Your Honor.

THE COURT: The second grade?

MR. RUELAS: Yes, sir.

THE COURT: But, from the way you talk, you sound as though you're well read or have had some other educational background.

MR. RUELAS: You can thank my mother for that, Your Honor.

THE COURT: She would teach you at home?

MR. RUELAS: I was home taught, Your Honor.

THE COURT: I see. But you only went to school, formal school, till the second grade?

MR. RUELAS: Barely the second grade, Your Honor.

THE COURT: And do you read books?

MR. RUELAS: I do.

THE COURT: I do. And what kind of -- what are some of the books that you've read? What have you read in the past?

MR. RUELAS: Generally speaking, Your Honor?

THE COURT: Yeah.

MR. RUELAS: Thomas Wolf, Tom Clancey, Maggie Newman, for[mer] speech writer for President Reagan, Pat Buchanan.

THE COURT: And Thomas Wolf, have you read Look Homeward Angel?

MR. RUELAS: Yes, sir.

THE COURT: You have read it?

MR. RUELAS: It's been a while, but I read it.

THE COURT: Okay. Any other educational interests that you've had in the past?

MR. RUELAS: That I have?

THE COURT: Yeah.

MR. RUELAS: Interests?

THE COURT: Interests, other than literature.

MR. RUELAS: Other than literature. Nothing to speak of, Your Honor. I have a few interests, but nothing -- the common, ordinary interests, Your Honor.

THE COURT: Okay. You have any questions, Ms. Bates?

MS. BATES: Just briefly, Your Honor. Mr. Ruelas . . .

MR. RUELAS: Yes, ma'am.

MS. BATES: . . . the assault and resulting death of your mother occurred at 619 St. Clair Street, is that correct?

MR. RUELAS: That's correct, ma'am.

MS. BATES: And that was the residence that you shared with her?

MR. RUELAS: That's correct, ma'am.

MS. BATES: And that's in the city and county of Jackson?

MR. RUELAS: Indeed.

MS. BATES: I don't have anything further, Your Honor.

THE COURT: I -- I don't know much about this case, Mr. Ruelas, other than what I read in the newspaper; and, again, I didn't read very much about because I didn't know, maybe I might get the case, and I did. But, as I understand it, your mother was -- was struck repeatedly, repeatedly. And you're just telling me you hit her once or did you hit her more than once?

MR. RUELAS: It was more than once.

THE COURT: You hit her more than once?

MR. RUELAS: It was more than once.

THE COURT: Oh, yeah. How many times? Can you guess how many times you hit her?

MR. RUELAS: If memory serves, it was about three, about three times.

THE COURT: Three times. Did you kick her?

MR. RUELAS: No, sir.

THE COURT: Okay. All of it was by your hands?

MR. RUELAS: Yes, sir.

THE COURT: And you saw her fall?

MR. RUELAS: I did.

THE COURT: All right. You have anything that you -- I think I have enough for the type of hearing we're going to have.

MS. BATES: I'm satisfied, Your Honor, that the death was the result of an assault.

THE COURT: Okay.

MS. BATES: And that we can fix -- fix the particulars at the degree hearing.

THE COURT: Okay.

MR. RUELAS: The unintentional death.

THE COURT: Pardon.

MR. RUELAS: Forgive me for interjecting.

THE COURT: Yeah. That's all right.

MR. RUELAS: The unintentional death.

THE COURT: What kind of death?

MR. RUELAS: It was unintentional, Your Honor.

THE COURT: Unintent -- You say it was unintentional death. Okay.

MR. RUELAS: Forgive me --

THE COURT: -- no question that you struck her and beat her, huh?

MR. RUELAS: I'm sorry.

THE COURT: You beat her? At least three times you struck her?

MR. RUELAS: Struck her, yes.

THE COURT: Did you have fights with her before? Other occasions? Did you ever strike her before?

MR. RUELAS: Could I have a quick moment, Your Honor?

THE COURT: Yeah.

MR. RUELAS: There was a few years ago past, which you may be aware of, Your Honor, where -- where I did assault her.

THE COURT: You did assault her.

MR. RUELAS: Yes.

THE COURT: Okay. All right. Well, let the record indicate the Court will accept your plea of homicide and the Court will hold a hearing on the 29th of July to make a determination as tc what degree of -- of offense this is. And we'll reconvene at that time.

MS. BATES: Thank you, Your Honor.

THE COURT: But, at this point, the Court has accepted your plea.

MS. BATES: Thank you, Your Honor.

MR. RUELAS: Your Honor?

THE COURT: Yes.

MR. RUELAS: May I have a quick moment with my counsel?

THE COURT: Sure.

MR. RUELAS: Thank you.

(discussion between defense counsel And Defendant)

PROCEEDINGS CONCLUDED

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I hereby certify that this transcript represents the complete, true and correct rendition of the videotape of the proceedings as recorded.

I further state that I assume no responsibility for any events that occurred during the above proceedings of any inaudible responses or by any party or parties that are not discernible on the video of the proceedings.

Dated: October 23, 2002

SHERRIE L. MARINKOVICH, CER-6799

STATE OF MICHIGAN
4TH JUDICIAL CIRCUIT (JACKSON COUNTY)

FILED
JUL 31 2006
CLERK'S OFFICE
DETROIT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs- Docket No. 02-0770-FC

JOHN DAVID RUELAS,

Defendant.

_____/

VIDEO HEARING

BEFORE THE HONORABLE ALEXANDER C. PERLOS, CIRCUIT COURT JUDGE

Jackson, Michigan -- August 2, 2002

APPEARANCES:

For the Plaintiff: Allison Bates (P45282)
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For the Defendant: Wendell Jacobs, Jr. (P15406)
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WITNESSES: PLAINTIFF

None.

EXHIBITS: IDENTIFIED RECEIVED

None.

Jackson, Michigan

August 2, 2002 - Tape shows 01:52:12

THE COURT: Okay. Court's on the record in the matter of People verses John David Ruelas. This matter is set for hearing this Monday, the 28th, is it Barb?

CLERK: It was July --

THE COURT: July.

CLERK: July 29th, yeah.

THE COURT: And the Court heard the testimony of Dr. Alexandrov, Deputy Gross, Deputy, or Police Officer Schuette. The Court had the hearing to make a determination of degree of homicide that this matter occasioned. The Defendant having previously plead guilty to, under the statute, to the homicide of his mother, but without a specification of degree. After the Court heard the proofs, the Court makes the finding that in fact there was a very bad relationship between Mr. Ruelas and his mother. That he had beaten her in the past, and that on this occasion, the week prior to her demise, on Tuesday, he had beaten her. That a beating on Thursday before her death was apparently quite severe. Mr. Ruelas was not particularly sure of how many times he struck his mother, but he knows he struck her at least twice. The injuries showed broken ribs on both sides of the rib cage, damage to the adrenal area and sever contusions all over her body. The court could not find any specific intent in this case. The Court could not find a premeditated murder. And so, murder one is out. But, I do think that murder two was well

demonstrated. The Defendant did great bodily harm to the victim knowing that he created a high risk of death, or great bodily harm knowing that death from such harm would likely result of his actions. And so, the Court does make a finding of Mr. Ruelas is guilty of second degree murder under the laws of this state. His sentencing will be . . .

CLERK: August 15.

THE COURT: . . . 15th of August at 8:30 in the morning.

MS. BATES: Thank you very much, Your Honor.

THE COURT: Okay.

MS. BATES: May I retrieve the exhibits from the Court at this time?

THE COURT: Yeah. You can take them.

MS. BATES: Thank you.

PROCEEDINGS CONCLUDED

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I hereby certify that this transcript represents the complete, true and correct rendition of the videotape of the proceedings as recorded.

I further state that I assume no responsibility for any events that occurred during the above proceedings of any inaudible responses or by any party or parties that are not discernible on the video of the proceedings.

Dated: October 21, 2002

SHERRIE L. MARINKOVICH,
CER-6799

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF JACKSON

PEOPLE OF THE STATE
OF MICHIGAN,

-vs- Case No. 02-0770-FC

JOHN DAVID RUELAS, HON: CHAD C. SCHMUCKER
CIRCUIT COURT
JUDGE

Defendant.

_____/

DONALD R. COOK P30565
Attorney for Defendant
645 Griswold, Suite 1312
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313-964-6677

MOTION TO WITHDRAW GUILTY PLEA
INCLUDES CITES

Defendant, acting by and through his attorney, DONALD R. COOK, states to this Honorable Court as follows:

1. On July 17, 2002, the Defendant herein pled guilty to Open Murder. MCL 750.318.

2. The statue in question reads as follows:

750.318. Degree of murder, determination; testimony, open court, transcript

> § 318. The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict,

> whether it be murder of the first or second degree; but, if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk.

3. At the time of entering the plea, the defendant was informed that the Judge would determine whether the offense in question was Murder 1st Degree, Murder 2nd Degree, or Manslaughter.

4. Unfortunately, under Michigan law, the only question to be resolved upon a plea of guilty to an open charge of murder is whether the accused's guilt is of the first or second degree. *Berry v. Mintzes*, E.D.Mich. 1981, 529 F. Supp. 1067, affirmed 726 F.2d 1142, certiorari denied 104 S. Ct. 3520, 467 U.S. 1245, 82 L.Ed.2d 828.

5. Manslaughter is different than murder because the element of malice, express or implied, which is the very essence of murder, is absent.

> 6. "Where defendant pleaded guilty to second-degree murder, court was not required to examine witnesses in order to determine whether defendant was guilty of manslaughter on ground that manslaughter is a degree of the crime of

murder within meaning of P.A. 1931, No. 328, § 318 requiring court to determine the degree of murder when a defendant pleads guilty to murder, since "manslaughter" is distinguished from "murder" in that the element of malice, express or implied, which is the very essence of murder, is absent. *People v. Grillo* (1948) 30 N.W.2d 284, 319 Mich. 586.

7. Unlike a trial, where manslaughter may be an appropriate lesser offense that should be considered, when there is a confession to murder, the judges options are limited.

8. Should the Judge have not found a factual basis for murder, he would have had to reject the plea. *People v. Harper* (1971) 188 N.W.2d 254, 32 Mich.App. 73.

9. Mr. Ruelas wishes to withdraw his guilty plea as it was made based upon incorrect information as to the offenses that the Judge could legally consider.

10. He would also note that the trial court did not inform him that he would be losing his right to appeal. Finally, he would note that he was not informed that he could not get probation for the charge of Murder in the 2nd Degree.

WHEREFORE, Defendant moves this Honorable Court to set aside the guilty plea and allow this case to go to trial.

Respectfully submitted;

DONALD R. COOK P30565
Attorney for Defendant

STATE OF MICHIGAN
4TH JUDICIAL CIRCUIT (JACKSON COUNTY)

FILED
JUL 31 2006
CLERK'S OFFICE
DETROIT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. File No. 02-0770-FC

JOHN DAVID RUELAS,

Defendant.

_____/

MOTION HEARING

BEFORE THE HONORABLE CHAS SCHMUCKER,
CIRCUIT COURT JUDGE

Jackson, Michigan - Tuesday, September 16, 2003

APPEARANCES:

For the Plaintiff: Asst. Prosecuting Attorney
Jackson County
Jerrold E. Schrotenboer (P33223)
312 S Jackson St
Jackson, MI 49201-2220
517 788-4283

For the Defendant: Donald R. Cook (P30565)
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TABLE OF CONTENTS

WITNESSES: PLAINTIFF

NONE

WITNESSES: DEFENDANT

NONE

OTHER MATERIAL IN TRANSCRIPT:

Motion by Mr. Cook

EXHIBITS: INTRODUCED ADMITTED

NONE

Jackson, Michigan

September 16, 2003 - 8:33:37 a.m.

THE COURT: The Ruelas matter. This is the Defendant's motion to withdraw plea. Are you Mr. Cook?

MR. COOK: Yes, your Honor. For the record my name is Donald Cook, appearing on behalf of Mr. John David Ruelas. I pronounce it Ruelas, you may be-

THE COURT: I have no idea. I'm willing to go with whatever you suggest.

MR. COOK: Your Honor, I think I pretty much put this-

THE COURT: There are two grounds. One, that you didn't advise him of his, ah, that it was leave to appeal and the other ground is that it was the, ah, suggesting that he consider manslaughter as improper, the hearing should have been limited to first or second degree.

MR. COOK: Well, and it's a nullity for manslaughter. Now, I'm not going to say that in the response that they said that Judge Perlos may have very well have considered manslaughter and I'm winning to say that he probably did but, that wouldn't have prevented the Prosecutor, had he reached manslaughter, from saying, "But, Judge, that's a nullity" because I don't know if they ever reached or were part of any sort of agreement that he could consider manslaughter.

THE COURT: Well, weren't they in court when the plea was entered and everything like that?

MR. COOK: But if somebody had raised that to the Court of Appeals, however it got there, maybe the gentleman didn't think he should have gotten that sentence and some didn't think he should have gotten that sentence and some bright energetic person like Mr. Schrotenboer says, "Judge, he couldn't have even gotten that anyway." They would have just turned it around or perhaps on their own motion they would have turned it around because it is a nullity. You can't do that.

Now, I'm not saying that anybody was trying to be deceitful or, you know, we'll slip one by them here. Frankly I think they didn't know what they were doing. People think it's like a trial and so they give him a claim of appeal rather than an application. As a matter of fact, I was appointed on a claim of appeal, which is wrong, it's going to be thrown out, it's going to be by application. They are saying we can do manslaughter, we can't. They, ah, I just took one up to the Supreme Court that they waive all sorts of appellate rights when they do this and nobody seems to understand that. There's so many things wrong with that whole procedure that frankly I don't think they knew what they were doing. And what they promised him on this one is the Judge can consider all those and maybe the Judge did but-

THE COURT: But how could-

MR. COOK: It's a nullity.

THE COURT: But I guess the, um, how can there be an error to that? I mean, even if he said he was going to consider retail fraud, if he found him guilty of first degree murder, it doesn't really matter what else he can consider does it?

MR. COOK: All I understand, if he found him guilty of first degree murder-

THE COURT: You don't even have to consider second. I mean, if you find first degree is proven, you don't have to comment on second do you? I mean, just like you wouldn't have to comment on the manslaughter once you find the second.

MR. COOK: Well, it still seems to me that when you say the Judge is going go consider all three of these things, I mean, fact can not consider all of those things and perhaps that was his basis for entering the plea figuring that he thinks it's manslaughter. Frankly, when I talked to him he thinks it is manslaughter, that's why he wants to proceed with this. I happen to disagree with him but that's his belief. And if he believes that then in fact it's not possible through the procedure that he did.

THE COURT: Okay.

MR. COOK: Then I think that's an (inaudible) plea.

THE COURT: Okay. Let's hear about the second--about the appellate rights.

MR. COOK: Well, your Honor-

THE COURT: It should have been leave and they told him he had a claim--they didn't comment--they didn't tell him at all, he was waiving his right to a claim of appeal.

MR. COOK: Your Honor, as was suggested, if there was anything that he could have appealed, maybe that would be important but obviously since, as they said, he doesn't have anything else to appeal, that's not important but, he does have other things

to appeal. As I've just mentioned, I thought I came up with a fairly interesting thing when I saw it said wait a minute, they can't even consider manslaughter but now we're saying that can only go up on leave to appeal. So, that creates--that becomes a much more important, right?

There are all sorts of things my client--my client is talking about all sorts of things involving whether or not the statements that came in were legitimate or should have been kept out because of Miranda or whatever but, all of that is waived with the plea. And as I've written to him, I can't really get into that, that's all waived and I don't think he understood any of that, your Honor. I think everybody that proceeded with this procedure thought that essentially they were going to be doing a bench trial, only we'll call it a plea and he comes forward and we'll treat him as a person who's actually accepting responsibility and so on and perhaps giving him a little bit of benefit of the doubt because he is accepting responsibility. But I see getting no advantage.

THE COURT: Okay. Thank you Mr. Cook. I have read your answers. Is there anything else you want to add to this? I mean, you filed one answer with the--that addressed the appellate rights and then the other answer that addressed the degree hearing.

MR. SCHROTENBOER: Actually no, Your Honor.

THE COURT: Well, in terms of the degree hearing, I mean, I think it was error but it was, I mean, it was un-preserved. They actually sort of

seemed like they were part and parcel with it in assisting the Judge in making the error. I think it was harmless, given the fact that they had a hearing and he was found guilty of second degree. So, I think that unpreserved error is harmless and I don't think it's a sufficient basis for setting aside the plea.

The appellate rights, the failure to give that, it strikes me, is that it also was improper but I think there is substantial compliance with the rule. So, I find that's an insufficient reason to set aside the plea. The motion is denied for those reasons.

MR. COOK: Thank you very much, your Honor.

MR. SCHROTENBOER: Thank you. I'll be supplying the order after the transcript shows up. Mr. Ruelas['s] time line for appealing is very, very tight right now. So, I guess we'll first get the transcript and then the order otherwise, he'll be screwed.

THE COURT: Okay. So, do you want Shannon to--?

MR. SCHROTENBOER: Well, I believe that Mr. Cook would have to request-

MR. COOK: I already requested-

THE COURT: You're requesting the transcripts, okay. Let's get a transcript of this hearing.

SHANNON: Who am I going to send it to because they usually have to go through Theresa's.

THE COURT: Yeah, that's what I mean.

SHANNON: Okay. Who do you want me to send it to?

THE COURT: Theresa.

SHANNON: Who do you want me to send the tape to-er, the transcript to? Us or Jerry?

THE COURT: Yeah. Yeah. Send it to--I don't know how they do it.

MR. SCHROTENBOER: Send it directly to the court reporter.

(At 8:41:28 a.m. hearing concluded)

CERTIFICATION

This is to certify that the attached video taped proceeding, consisting of 8 pages, before the 4th Judicial Circuit Court, Jackson County in the matter of;

People of the State of Michigan

v.

John David Ruelas

Location: Jackson, Michigan

Date: Tuesday, September 16, 2003

Was held as herein appeared and that this is testimony from the original transcript of the video tape there of, to the best of my ability, for the file of the Bureau.

I further state that I assume no responsibility for any events that occurred during the above proceedings or any inaudible responses by any party or parties that are not discernible on the video of the proceedings.

_____

Sheila D. Burger, CER 6651
Certified Electronic Recorder

Dated: September 19, 2003

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF JACKSON

PEOPLE OF THE STATE OF MICHIGAN,	CIRCUIT COURT NO. 02-000770-FC
PLAINTIFF-APPELLEE,	
v.	
JOHN DAVID RUELAS,	HONORABLE CHAD C. SCHMUCKER
DEFENDANT-APPELLANT.	

ORDER

The motion to withdraw the plea is denied.

January 5, 2004

HONORABLE CHAD C. SCHMUCKER
CIRCUIT COURT JUDGE

Court of Appeals, State of Michigan

ORDER

FILED
JUL 31 2006
CLERK'S OFFICE
DETROIT

PEOPLE v. JOHN DAVID RUELAS

HILDA R. GAGE
Presiding Judge

Docket No. 253463

JESSICA R. COOPER

LC No. 02-000770-FC

PAT M. DONOFRIO
Judges

The Court orders that the defendant-appellant's delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

Judge Cooper would grant the delayed application for leave to appeal.

HILDA R. GAGE
Presiding Judge

STATE OF MICHIGAN
COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

March 3, 2004
Date

Sandra Schultz Mengel
Chief Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DAVID RUELAS,

Petitioner,

Case No. 06-CV-11994

v.

HUGH WOLFENBARGER,

HON. DENISE PAGE HOOD

Respondent.

_____/

OPINION AND ORDER (1) DENYING RESPONDENT'S RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT; (2) GRANTING RESPONDENT'S MOTION FOR STAY PENDING APPEAL; (3) DENYING PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL AND (4) DENYING WITHOUT PREJUDICE PETITIONER'S MOTION TO ISSUE UNCONDITIONAL WRITE OF HABEAS CORPUS

Petitioner John David Ruelas has filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his conviction for second-degree murder, obtained by virtue of a guilty plea. On March 31, 2008, the Court issued an Opinion and Order Conditionally Granting Petitioner's Writ of Habeas Corpus on the ground that his plea was involuntary because it was based upon the mistaken

advice that manslaughter would be considered at the degree hearing. The Court ordered Respondent to take action to afford Petitioner a new trial within ninety days and provided that, should Respondent fail to comply with the conditional writ, Petitioner could apply for a writ for release from custody. Now before the Court are Repondent's Rule 60(b) Motion for Relief from Judgment[1] and Motion for Stay Pending Appeal, and Petitioner's Motion for Appointment of Counsel and Motion to Issue Unconditional Writ.

I. Respondent's Motion for Relief from Judgment

In his Motion for Relief from Judgment, Respondent argues that, rather than granting conditional habeas relief, the Court should have held an evidentiary hearing because such a hearing would have established that Petitioner's claim that he would not have pleaded guilty but for his belief that manslaughter would be considered by the trial judge is meritless. In support of this argument, Respondent attaches affidavits from the trial prosecutor and defense counsel, which, Respondent argues, "cast doubt on any claim that Petitioner was prejudiced." (Respondent's Motion for Relief from J., p. 2).

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[1] Respondent filed two Motions for Relief from Judgment, docket entries # 45 and #50. The Motions are identical and shall be treated as one motion.

Rule 60(b) authorizes a court to grant a party relief from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or other misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justified relief.

Fed. R. Civ. P. 60(b).

Respondent does not specify the subsection pursuant to which he seeks relief from judgment. As Respondent offers proof of newly discovered evidence in the form of two affidavits, the Court concludes that he seeks relief pursuant to subsections (2) and (6).

To succeed under Rule 60(b)(2), a movant must "demonstrate (1) that is exercised due diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment." *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998) (internal citation omitted). The affidavits presented by Respondent were clearly obtainable prior to the Court's judgment

and Respondent has filed to show that he exercised due diligence in seeking to obtain them. *See Watts v. Fed. Exp. Corp.*, 52 Fed. App'x 819, 821 (6th Cir. June 21, 2001) (affirming denial of 60(b)(2) motion which was largely predicated upon affidavits which could have been discovered through the exercise of due diligence prior to the district court's judgment). In addition, the affidavits would not clearly have produced a different result if presented prior to the Court's judgment.

Rule 60(b)(6) relief may be granted only in "unusual and extreme situations where principles of equity *mandate* relief." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (emphasis in original). Respondent disagrees with the Court's decision granting a conditional writ, but alleges no unusual or extreme circumstances which would warrant relief under Rule 60(b)(6). His disagreement with the Court's ruling is an insufficient basis on which to grant Rule 60(b)(6) relief.

II. Respondent's Motion for Stay Pending Appeal

Respondent also has filed a Motion for Stay Pending Appeal. In deciding whether to stay an order granting habeas corpus relief pending appeal, a federal court should consider the following factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;

> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
>
> (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987).

The Court may also consider the risk that a petitioner may pose a danger to the public if released. *Id.* at 777. Also to be considered is the state's interest in "continuing custody and rehabilitation pending a final determination of the case on appeal. . . ; it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served." *Id.* The ultimate determination "may depend to a large extent upon determination of the State's prospects of success in its appeal." *Id.* at 778. Where the state establishes a strong likelihood of success on the merits, or even demonstrates a substantial case on the merits, continued custody is permissible if the State will be irreparably injured absent a stay and the public interest counsels in favor of a stay. *Id.* Where the state fails to make such a showing, the stay should be denied. *Id.*

In addition, Federal Rule of Appellate Procedure 23(c) provides that, while a decision ordering the release of a prisoner is on appeal, "the prisoner must - unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise - be released on the personal recognizance, with or

without surety." The United States Supreme Court has held that this rule "undoubtedly creates a presumption of release from custody in such cases." *Hilton*, 481 U.S. at 774. That presumption, however, may be overcome in the district court judge's discretion. *Id.*

Under the first *Hilton* factor, the Court must consider whether the State has made a strong showing that it is likely to succeed on the merits. Respondent argues that his likelihood of success on the merits is great because Petitioner failed to show that would not have pleaded guilty had he realized that the offense of manslaughter would not have been considered. The Court finds Respondent's arguments in this regard unpersuasive.

Second, the Court must consider whether the State and the public will be irreparably injured absent a stay because Petitioner presents a flight risk and his release would pose a real and substantial danger to the public. Petitioner does not contest that his actions resulted in the death of his mother. Therefore, his offense, no matter the degree, is a serious one. In addition, the pre-sentence investigation report prepared by the state in connection with this offense indicates a criminal history of kidnapping and assault and this his wife reported being fearful on him. Given this history, the State and public's interests lie in favor of granting a stay.

Finally, the Court must consider whether issuance of a stay will substantially injure Petitioner. While the Court notes that Petitioner

may be injured by his continued confinement pursuant to a conviction this Court has found to be constitutionally infirm, such continued confinement may be addressed through a request for bond by Petitioner.

Considering all of the *Hilton* factors, the Court determines that it would be a waste of judicial resources for the appeal to proceed in the Sixth Circuit Court of Appeals, while simultaneously requiring the State to retry Petitioner. Therefore, the Court shall grant a stay.

III. Petitioner's Motion for Appointment of Counsel

Petitioner has filed a Motion for Appointment of Counsel on appeal. There exists no constitutional right to the appointment of counsel in civil cases, and the court has broad discretion in determining whether counsel should be appointed. *Childs v. Pellegrin*, 822 F.2d 1382, 1384 (6th Cir. 1987) ("[A]ppointment of counsel in a civil case is . . . a matter within the discretion of the court. It is a privilege and not a right.") (internal quotation omitted). A habeas petitioner may obtain representation at any state of the case "[w]henever the United States magistrate or the court determines that the interests of justice so require." 18 U.S.C. §3006A(a)(2)(B). In the instant case, the Court determines after careful consideration that the interests of justice do not require appointment of counsel.

IV. Petitioner's Motion to Issue Unconditional Writ of Habeas Corpus

Petitioner also has filed a Motion to Issue Unconditional Writ of Habeas Corpus. The Conditional Writ required the State to afford Petitioner a new trial within ninety days. If the State failed to do so, the Court provided that Petitioner could move for the issuance of an unconditional writ. Ninety days have elapsed and, according to Petitioner, the State has not moved to retry him. Petitioner, therefore, asks for the issuance of an unconditional writ.

Within thirty days of the issuance of the Conditional Writ, the State moved for a stay pending an appeal to the Sixth Circuit Court of Appeals. Because the State promptly moved for a stay and acted reasonably in waiting to retry Petitioner until the Court issued an Order regarding the Motion to Stay, the Court finds that issuance of an unconditional writ it not warranted. The Court, therefore, shall deny the motion without prejudice to Petitioner's right to seek an unconditional writ at a later date if, after resolution of the appeal, Respondent fails to comply with the Conditional Writ.

V. Conclusion

Accordingly,

IT IS ORDERED that Respondent's Motion for Relief from Judgment [dkt. #45 & 50] is **DENIED.**

IT IS FURTHER ORDERED that Respondent's Motion for Stay Pending Appeal [dkt. #48] is

GRANTED and this Court's Opinion and Order Conditionally Granting Petition for Write of Habeas Corpus is **STAYED PENDING DISPOSITION OF APPEAL** pending in the United States Court of Appeals for the Sixth Circuit.

IT IS FURTHER ORDERED that, if the Sixth Circuit Court of Appeals affirms this Court's judgment conditionally granting a writ of habeas corpus, the stay shall automatically be lifted and the State must schedule a new trial within **NINETY DAYS** of the disposition of the appeal of Petitioner shall be unconditionally released.

IT IS FURTHER ORDERED that Petitioner's Motion for Appointment of Counsel [dkt. #52] and Motion to Issue Unconditional Writ of Habeas Corpus [dkt. #59] are **DENIED**.

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: August 19, 2009

I hereby certify that a copy of the foregoing document was served upon counsel of record and John D. Ruelas, Reg. No. 422108, Standish Maximum Correctional Facility, 4713 W. M-61, Standish, MI 48658 on August 19, 2009, by electronic and/or ordinary mail.

S/William F. Lewis
Case Manager